

No. 15752

United States
Court of Appeals
for the Ninth Circuit

MATHEW J. SPIESMAN, JR., and MARY
SPIESMAN,
Petitioners,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

Petition to Review a Decision of the Tax Court
of the United States

FILED

DEC 20 1957

PAUL P. GERKEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

PAUL CASTOLDO and
FRANCIS J. BUTLER,
811 Paulsen Bldg.,
Spokane (1) Wash.,

For Petitioners.

CHARLES K. RICE,
Assistant Attorney General, Tax Division;
NELSON P. ROSE,
Chief Counsel, Internal Revenue Service,
Washington, D. C.,

For Respondent.

In the Tax Court of the United States

Docket No. 56141

MATHEW J. SPIESMAN, JR., and MARY
SPIESMAN,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES

1955

Jan. 28—Petition received and filed. Taxpayer notified. Fee paid.

Jan. 31—Copy of petition served on General Counsel.

Jan. 28—Request for Circuit hearing in Boise, Idaho, filed by taxpayer. 2/4/55, denied.

Mar. 15—Answer filed by General Counsel.

Mar. 21—Copy of answer served on taxpayer, Boise, Idaho.

Apr. 6—Request for place of hearing at Portland, Oregon, filed by General Counsel.

Apr. 8—Order denying respondent's request of 4/6/55 and vacating the action on petitioner's request of 2/4/55 and said request is granted and Boise, Idaho, or vicinity is now designated as place of hearing, entered.

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June 28—Hearing set October 8, 1956, Boise, Idaho.
Oct. 8—Trial had before Judge Bruce on merits.

Submitted on stipulation of facts. Stipulation of facts with joint exhibits 1-A thru 7-G, and notice to produce, filed at hearing. Petitioner's brief, 11/23/56; respondent's brief, 12/24/56; petitioner's reply, 1/8/57.

Oct. 22—Transcript of Hearing 10/8/56, filed.
Nov. 20—Brief filed by petitioner. 11/21/56, served.
Dec. 17—Motion for extension of time to January 14, 1957, to file brief filed by respondent. 12/18/56, granted. Served 12/20/56.

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Jan. 14—Motion to extend time to 1/24/57 to file brief filed by respondent. 1/15/57, granted.
Served 1/17/57.

Jan. 24—Brief filed by respondent.

Feb. 11—Reply brief filed by petitioner. Served 2/11/57.

May 31—Findings of fact and opinion filed. Bruce J. Decision will be entered. Served June 4, 1957.

June 4—Decision entered, Judge Bruce, Div. 6.
Served 6/7/57.

Aug. 26—Motion by petitioner to withdraw Myron E. Anderson. 8/27/57, granted. Served 8/28/57.

Aug. 27—Order amending decision of June 5, 1957, entered. Served 8/29/57.

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Aug. 30—Petition for review by U.S.C.A. 9th, with proof of service thereon, filed by petitioners.

Aug. 30—Entry of appearance of Paul Castoldi as counsel filed.

Aug. 30—Entry of appearance of Francis J. Butler as counsel filed.

Sept. 5—Proof of service of petition for review filed.

Sept. 13—Statement of Points with proof of service thereon filed.

Sept. 13—Designation of Contents of Record on review with proof of service thereon filed.

In the Tax Court of the United States

Docket No. 56141

MATHEW J. SPIESMAN, JR., and MARY SPIESMAN,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION

The above-named petitioners hereby petition for a redetermination of the deficiencies set forth by the Commissioner of Internal Revenue in his Notice of Deficiency (Bureau Symbols Ap:P:AA:REK), dated November 18, 1954, and as a basis of this proceeding they allege as follows:

I.

The petitioners are individuals and husband and wife whose residence are, and were during the taxable years, in St. Maries, Idaho. The return for the year of 1951, was filed as a joint return on a community property basis with the Collector of Internal Revenue for the District of Idaho. The return for the year of 1952, was filed as a joint return on a community property basis with the Director of Internal Revenue for the District of Idaho.

II.

The notice of deficiency dated November 18, 1954 (copy of which is attached and marked Exhibit "A") was mailed to petitioners on or after the date of the notice.

III.

The Commissioner has determined deficiencies in income tax for the year ending December 31, 1951, in the amount of \$2,155.22, and for the year ending December 31, 1952, in the amount of \$14,056.20 and penalties under Section 294(d)(2)IRC for the year of 1951 of \$356.93, and for the year of 1952, \$986.14, all of which are in controversy.

IV.

The determination of tax set forth in said notice of deficiency is based upon the following errors:

- (a) The determination that all except one ninth of the net income from the partnership of Spiesman and Sons for the period from December 1st, 1951, to December 31st, 1951, was taxable to petitioners.

(b) The determination by the Commissioner that all of the amount of \$3,111.00 claimed as a bad debt deduction should be treated as a non-business bad debt and the adjustment resulting therefrom as a Short-Term Capital Loss carry forward.

(c) The determination by the Commissioner that petitioners underestimated their income tax for the year of 1951 and that taxpayers were subject to the penalty under Section 294 (d)(2)IRC.

(d) The determination that petitioners understated their income from the partnership of Spiesman and Resor for the year of 1952.

(e) The determination by the Commissioner that all except one-ninth of the income from the partnership of Spiesman and Sons for the period from 1/1/52 to 12/31/52 was taxable to petitioners.

(f) The adjustment made by the Commissioner to net gain from sale of Capital Assets.

(g) The failure of the Commissioner to recognize the grandchildren of Mathew J. Spiesman, Sr., who are also the children of Mathew J. Spiesman, Jr., as partners in the partnership of Spiesman and Sons, and the failure to recognize that the children were each bona fide owners of one-ninth interest in said partnership.

(h) The determination by the Commissioner that the earnings of Spiesman and Sons were primarily from the Capital and Services of Mathew J. Spiesman, Jr.

(i) The determination by the Commissioner that petitioners underestimated their income tax for the year of 1952 and that they are subject to the penalty under section 294(d)(2)IRC.

V.

The facts upon which the petitioner relies as the basis for this proceedings are as follows:

Preliminary Facts

(a) Petitioners filed a timely income tax return for the years of 1951 and 1952 reporting a net income of \$41,442.84, for the year 1951 and net income of \$30,199.84 for the year of 1952.

(b)(1) Included in the gross income reported in said Federal income tax return for the year of 1951 was partnership income from the partnership of Spiesman and Spiesman of \$33,562.81, income from the partnership of Spiesman and Sons, of \$1,084.76, and from the partnership of Spiesman and Resor of \$230.84. Also claimed in said return was a deduction for bad debts of \$3,411.00.

(2) Included in the gross income reported for the year of 1952 was partnership income from the partnership of Spiesman and Sons of \$16,940.61 and partnership income from Spiesman and Resor of \$136.64.

(c)(1) For the period from 1/1/51 to 11/30/51 the partnership of Spiesman and Spiesman (Mathew J. Spiesman, Sr., and Mathew J. Spies-

man, Jr.) filed an information return on form 1065 showing a net income of \$50,344.21, said information return showed the net income divisible one-third to Mathew J. Spiesman, Sr., and two-thirds to petitioners.

(2) For the period from 12/1/51 to 12/21/51 the partnership of Spiesman and Sons filed information return on form 1065 showing a net income of \$3,254.30, said information return showed the net income divisible one-third to petitioners, one-ninth each to the following: Mathew J. Spiesman, Sr.; Mathew J. Spiesman, III; Philip Spiesman, Michael Joe Spiesman; Leonard Spiesman and Francis Spiesman.

(3) For the taxable year ending December 31, 1952, the partnership of Spiesman and Resor, filed an information return showing a net income of \$273.28, said information return showed the income divisible one-half to petitioners and one-half to Stanley Resor.

(4) For the taxable year ending December 31, 1952, the partnership of Spiesman and Sons filed information returns on form 1065 showing a net income of \$46,021.71, said information return showed that the income was divisible one-third to petitioners and one-ninth to each of the following; Mathew J. Spiesman, Sr.; Mathew J. Spiesman, III; Michael Joe Spiesman; Philip Spiesman; Leonard Spiesman and Francis Spiesman.

Partnership Issue

(d) The partnership of Spiesman and Spiesman was the predecessor of the business of Spiesman and Sons. The equipment, consisting chiefly of coin operated amusement and gaming devices, were owned equally by Mathew J. Spiesman, Sr., and Mathew J. Spiesman, Jr., however, the profits were distributed one-third to Mathew J. Spiesman, Sr., and two-thirds to petitioners.

(e)(1) That Mathew J. Spiesman, Sr., was in the Cigar and Pool Hall business from 1911 until he sold out in 1935. At that time he went into semi-retirement.

(2) That on or about the 1st of May, 1938, he made a gift to his son Mathew J. Spiesman, Jr., in order that his son could purchase one-half interest in the business formerly owned by Mathew J. Spiesman, Sr. Mr. Stanley Resor purchased the other one-half and thus the partnership of Spiesman and Resor was formed .

(3) That in 1943 Mathew J. Spiesman, Sr., gave his son Mathew J. Spiesman, Jr., a house and lot in the town of St. Maries, Idaho.

(4) That during the year of 1944 Mathew J. Spiesman, Sr., helped organize and financed the Gem State Club, a non-profit club organized under the laws of the State of Idaho.

(5) That in 1945 Mathew J. Spiesman, Sr., desiring to further distribute part of his estate while

he was alive and also desiring to assist in making his grandchildren financially independent made gifts of dividend paying stocks to his grandchildren, Leonard J. Spiesman and Michael Joe Spiesman, and during the same year gave his son Mathew J. Spiesman, Jr., another house and lot in St. Maries, Idaho.

(6) That in the month of January, 1946, Mathew J. Spiesman, Sr., made further gifts of dividend paying stock to his grandchildren, Philip J. Spiesman, Michael Joe Spiesman and Leonard Spiesman and to his son Mathew J. Spiesman, Jr.

(7) That on January 9th, 1951, Mathew J. Spiesman, Sr., made a gift of dividend paying stock to his grandchild Mathew J. Spiesman, III.

(8) That Mathew J. Spiesman, Sr., read an article in the October, 1951, issue of "U.S. News and World" report at page 68, which indicated that under the new law that children could be made partners by giving, or selling, them the ownership in the property or business. He advised his son that he desired to give the grandchildren his interest in the partnership of Spiesman and Spiesman and asked his son to contact the Bureau of Internal Revenue and determine if the article he had read was correct. His son did contact the Bureau of Internal Revenue office at Boise, Idaho, and was given a copy of the new law, now section 191, I.R.C. and the amendment to section 3797 I.R.C. and was told that if bona fide transfers of ownership in property were made to minors that the minors would be rec-

ognized and entitled to their share of the income from the property.

(9) That on December 1st, 1951, Mathew J. Spiesman, Sr., gave 7/18th of interest in the equipment in the partnership of Spiesman and Spiesman to his five grandchildren.

(10) That on December 1st, 1951, petitioners gave 100 shares of Bunkerhill and Sullivan Mining Co. stock to his son, Mathew J. Spiesman, III; and a like amount of the same stock to his son, Francis Edward Spiesman. Petitioners also gave 3/18th of their interest in the equipment in the partnership of Spiesman and Spiesman to their five children, heretofore named.

(f) On December 1st, 1951, the Partnership of Spiesman and Spiesman was discontinued and a new partnership formed by and between Mathew J. Spiesman, Sr; Mathew J. Spiesman, Jr; Mathew J. Spiesman, III; Machael J. Spiesman; Philip J. Spiesman; Leonard J. Spiesman and Francis E. Spiesman. Said partnership was to be known as Spiesman and Sons and was organized for the purpose of carrying on the business of owning and operating coin operated amusement and gaming devices and the profits were shared one-ninth to all the partners except petitioners who received one-third of the profits. The partnership agreement is recorded in book six at page 558 of the Miscellaneous records of Benewah County, State of Idaho. There is an error in the first sentence of the fourth paragraph of said agreement and should have read

as follows: "At the time of this agreement, the assets to be taken over by the partnership are in possession and owned equally by the partners Mathew J. Spiesman, Sr., and Mathew J. Spiesman, Jr., and are in a value of \$2,374.63." It was the intention of Mathew J. Spiesman, Sr., to transfer by gift all but one-ninth of his one-half interest in the equipment to his grandchildren and it was the intention of petitioners to transfer by gift all but one-third of their one-half interest in the equipment to their children. It also was intended that each should invest \$100.00, for each one-ninth interest owned. This partnership is still in existence, though the income of same has materially dropped due to the outlawing of coin-operated gaming devices within the state, and the purpose and intent of the partnership is being carried out in the terms of the partnership agreement. This partnership is valid under the Idaho State law and is valid under section 191 I.R.C. and 3797 I. R. C.

(g) Mathew J. Spiesman, Jr., was duly appointed guardian of Michael J. Spiesman; Philip J. Spiesman; Leonard J. Spiesman; and Mathew J. Spiesman, III, on April 17th, 1947, and he was appointed guardian of Francis E. Spiesman on October 13th, 1953. Mathew J. Spiesman was acting in his fiduciary capacity and for the interest of the children when he accepted the gifts which made them members of the partnership of Spiesman and Sons. The probate court of Benewah County, has approved the partnership venture.

(h) Mathew J. Spiesman, Jr., receives a salary as manager of Spiesman and Son of \$250.00 per month which is a reasonable salary for his services. He also received a salary from the Gem State Club of \$6,000.00 per year in 1951 and 1952.

(i) Ownership of the equipment is an important income-producing factor and petitioners owning only one-third of the coin operated amusement and gaming devices, etc., are entitled to one-third of the profits. The children are real and bona fide owners of one-ninth interest each in the coin operated amusement and gaming devices and are entitled to and did report one-ninth of the income.

(j) The examination of the partnership of Spiesman and Resor was not discussed with Mathew J. Spiesman, Jr., and a copy of the examiners report was not furnished to petitioners until a short time ago. Petitioner does not believe the position taken by the examining officer is correct but inasmuch as most of the changes shifted income from one year to another petitioner will accept the proposed adjustments for 1952.

Bad Debt Issue

(k) Petitioners deducted on page three of their 1951 return an item of \$3,411.00, as bad debts. Three hundred dollars of this amount has since become collectable and therefore petitioners concede that that amount should be disallowed in its entirety. Six hundred ninety one dollars was loaned to patrons to play the coin operated gaming devices and there-

fore should be allowed as a business bad debt. The balance of \$2,420.00 is conceded to be a non-business bad debt and should be treated as short term capital loss.

Capital Gain and Loss Issue

(1) This adjustment stems from the consideration of the bad debts being treated as short term Capital loss. Of \$2,420.00 non-business bad debt conceded the amount of \$1,355.92 should be deducted as Short Term Capital loss in 1951 and the amount of \$1,064.08, carried forward to 1952.

Penalty Issue

(1) There was no intention on the part of petitioners to violate the law or evade taxation, but taxpayers estimated their tax to the best of their ability. The proposed deficiency in tax is entirely from the attempt of the Commissioner to shift the income to petitioners that the tax has already been paid on by others.

Wherefore, the petitioners pray that this Court may hear the proceedings and determine:

That the partnership of Spiesman and Sons is a valid partnership.

That the petitioners are taxable on one-third of the net income of the Partnership of Spiesman and Sons for the period from 12/1/51 to 12/31/51 and for the taxable year ending 12/31/52.

That for the year of 1951, the amount of \$691.00 be determined to be a business bad debt and allow-

able in full and that the amount of \$2,420.00 be determined as non-business bad debts.

That a short term Capital loss be allowed in 1951, in the amount of \$1,355.92, and that the amount of \$1,064.08, be carried forward as a short term capital loss to the taxable year of 1952.

That petitioners are not liable for the penalties under section 294(d)(2) for the taxable years of 1951 and 1952.

That there is a deficiency for the taxable year of 1951 of \$736.58, and a deficiency in 1952 of \$320.84.

/s/ MYRON E. ANDERSON,
Attorney for Petitioners.

Duly verified.

EXHIBIT A

Form 1231 (App.)

U. S. Treasury Department
Internal Revenue Service
Regional Commissioner
Appellate Division
P. O. Box 3935
Portland, Oregon

Nov. 18, 1954.

InReplying Refer to
Ap:P:AA:REK
90D:LS

Mathew J., Jr., and Mary Spiesman,
St. Maries, Idaho.

Dear Mr. and Mrs. Spiesman:

You are advised that the determination of your income tax liability for the taxable years ended December 31, 1951, and December 31, 1952, discloses deficiencies in tax aggregating \$16,211.42 and penalties aggregating \$1,343.07, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiency. In counting the 90 days you may not exclude any day unless the 90th day is a Saturday, Sunday, or legal holiday in the District of Columbia, in which event that day is not counted as the 90th day. Otherwise Saturdays, Sundays, and legal holidays are to be counted in computing the 90-day period.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Assistant Regional Commissioner, Appellate, P. O. Box 3935, Portland, Oregon. The signing and filing of this form will expedite the closing of your case by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on

the date of assessment, or on the date of payment, whichever is the earlier.

Very Truly Yours,

T. COLEMAN ANDREWS,
Commissioner.

By /s/ BOWDEN SAMMIS,
Acting Assistant Chief,
Appellate Division.

Enclosures:

Statement.

Form 1276.

Agreement Form.

Ap :P :AA :REK
90D :LS

Statement

Mathew J., Jr., and Mary Spiesman
St. Maries, Idaho

Tax Liability for the Taxable Years Ended December
31, 1951, and December 31, 1952

Income Tax

| Year | Liability | Assessed | Deficiency | Section 294(d)(2) Penalty |
|-------------|-------------|-------------|-------------|---------------------------|
| 1951 | \$16,106.36 | \$13,951.14 | \$ 2,155.22 | \$ 356.93 |
| 1952 | 23,760.12 | 9,703.92 | 14,056.20 | 986.14 |
| | ===== | ===== | ===== | ===== |
| Totals | \$39,866.48 | \$23,655.06 | \$16,211.42 | \$1,343.07 |
| | ===== | ===== | ===== | ===== |

In making this determination of your income tax liability, careful consideration has been given to the report of examination, a copy of which was mailed to you on March 26, 1954.

It is held that you substantially underestimated your tax liability for 1951 and 1952, and the 6% penalty for substantial underestimation of estimated tax is accordingly asserted under section 294(d)(2), 1939 Internal Revenue Code.

Inasmuch as the distribution of partnership income from Spiesman & Sons for 1952 has been revised by adding to your income the amounts previously shown as income of your dependent children, you are allowed five exemptions for 1952 rather than three as shown by the 1952 return.

A copy of this letter and statement has been mailed to your representative, Mr. Myron E. Anderson, 612 Idaho Building, Boise, Idaho, in accordance with the authority contained in the power of attorney executed by you.

Taxable Year Ended December 31, 1951

Adjustments to Net Income

Net income as disclosed by return..... \$41,442.84

Unallowable deductions and additional

income:

| | |
|----------------------------------|--------------------|
| (a) Partnership income increased | \$ 1,807.95 |
| (b) Miscellaneous deductions | |
| decreased | 3,411.00 |
| | 5,218.95 |
| Total | \$46,661.79 |

Nontaxable income and additional
deductions:

| | |
|---|----------|
| (c) Net gain from sale of capital assets decreased | 1,355.92 |
|---|----------|

Net income adjusted

\$45,305.87

Explanation of Adjustments

(a) Partnership income increased

Examination of the books and records of the partnership of Spiesman & Sons, St. Maries, Idaho, discloses that your share of the distributable income for the year is \$2,892.71. Inasmuch as you reported \$1,084.76, your taxable income has been increased by the difference of \$1,807.95, computed as follows:

Ordinary net income per partnership return

\$3,254.30

Corrected partnership ordinary net income

\$3,254.30

Your distributive share

\$2,892.71

Partnership income reported on your return

1,084.76

Understatement of partnership income

\$1,807.95

Explanation of partnership adjustments:

The income returned by your minor children as their respective distributive shares of partnership income has been eliminated from their incomes and included in your income in the total amounts shown above. It is determined that they were not partners for Federal income tax purposes under sections 191 and 3797(a)(2) of the Internal Revenue Code of 1939, as amended, and that the earnings of the business, Spiesman & Sons, are primarily attributable to the services of Mathew J. Spiesman, Jr., and your capital contributions; and further, that to no substantial extent are such earnings attributable to either capital or services of any of said minor children.

(b) Miscellaneous deductions decreased

It is held that nonbusiness bad debts may not be deducted as miscellaneous deductions. Accordingly, taxable income is increased by \$3,411.00. Under section 23(k), 1939 Internal Revenue Code, nonbusiness bad debts are to be considered as short-term capital losses and the \$3,411.00 is taken into account in adjustment (c), below.

(c) Net gain from sale of capital assets decreased

In adjustment (b), above, nonbusiness bad debts totaling \$3,411.00 were disallowed since nonbusiness bad debts must be treated as short-term capital losses under section 23(k), 1939 Internal Revenue Code, in the year they become worthless. It is held that \$3,111.00 of the \$3,411.00 became worthless in 1951.

Under section 117, 1939 Internal Revenue Code, the deduction for a net capital loss is limited to \$1,000.00. Thus, taxable income for 1951 is reduced by \$1,355.92. Computation is as follows:

| | |
|--|--------------|
| Net long-term capital gain—per return..... | \$ 355.92 |
| Nonbusiness bad debts treated as short-term capital losses | (3,111.00) |
| Balance | (\$2,755.08) |
| Less capital loss carry-over to 1952 | 1,755.08 |
| Net capital loss deduction for 1951 | (\$1,000.00) |
| Net capital gain reported on 1951 return | 355.92 |
| Reduction of 1951 taxable income | (\$1,355.92) |

Computation of Income Tax

| | |
|---|-------------|
| Net income as adjusted | \$45,305.87 |
| Less exemptions (5 times \$600.00) | 3,000.00 |
| Balance subject to tax | \$42,305.87 |
| One-half of \$42,305.87—joint return | \$21,152.94 |
| Tax on \$21,152.94 | \$ 8,053.18 |
| Total tax liability—2 times \$8,053.18 | \$16,106.36 |
| Assessed: Liability disclosed by return— original account No. BF 705—Idaho | 13,951.14 |
| Deficiency | \$ 2,155.22 |
| Liability for penalty: Section 294(d)(2), Internal Revenue Code: | |
| Total tax liability as adjusted | \$16,106.36 |
| Less: Tax withheld\$ 657.60 | |
| 1951 estimated | |
| tax | 9,500.00 |
| | 10,157.60 |
| Balance | \$ 5,948.76 |
| Penalty—6% of \$5,948.76 | \$ 356.93 |

Taxable Year Ended December 31, 1952

Adjustments to Net Income

| | |
|--|-------------|
| Net income as disclosed by return | \$30,199.84 |
| Unallowable deductions and additional income: | |
| (a) Partnership income increased | 25,333.90 |
| | |
| Total | \$55,533.74 |
| Nontaxable income and additional deductions: | |
| (b) Net gain from sale of capital assets decreased | 885.09 |
| | |
| Net income adjusted | \$54,648.65 |

Explanation of Adjustments

(a) Partnership income increased

Examination of the books and records of the partnership of Spiesman and Resor Pool Hall, St. Maries, Idaho, discloses that your share of the distributable income for the year 1952 is \$1,236.29. Inasmuch as you reported \$136.64, your taxable income has been increased by the difference of \$1,099.64, computed as follows:

| | |
|---|-------------|
| Ordinary net income per partnership return..... | \$ 3,273.28 |
| Add unallowable deductions and additional income: | |
| 1. Sales | \$ 799.30 |
| 2. Credit sales | 1,400.00 |
| | 2,199.30 |
| Corrected partnership ordinary net income | |
| | \$ 5,472.58 |
| Your distributive share | |
| | \$ 1,236.29 |
| Partnership income reported on your return | 136.64 |
| Understatement of partnership income | |
| | \$ 1,099.65 |
| Add understatement of partnership income from | |
| Spiesman & Sons, shown below | 24,234.25 |
| Total increase in partnership income | |
| | \$25,333.90 |

Explanation of partnership adjustments:

1. Gross receipts were inadvertently understated by \$799.30, and adjustment is made accordingly.
2. Since credit sales of \$1,400.00 on merchandise sold to Gem State Club, Inc., were not included in income, adjustment is made accordingly.

Examination of the books and records of the partnership of Spiesman & Sons, St. Maries, Idaho, discloses that your share of the distributable income for the year 1952 is \$41,174.86. Inasmuch as you reported \$16,940.61, your taxable income has been increased by the difference of \$24,234.25, computed as follows:

| | |
|--|-------------|
| Ordinary net income per partnership return | \$46,021.71 |
| Corrected partnership ordinary net income | |
| | \$46,021.71 |

| | |
|--|-------------|
| Your distributive share | \$41,174.86 |
| Partnership income reported on your return | 16,940.61 |
| Understatement of partnership income | \$24,234.25 |
| | ===== |

Explanation of partnership adjustments:

The income returned by your minor children as their respective distributive shares of partnership income has been eliminated from their incomes and included in your income in the total amounts shown above. It is determined that they were not partners for Federal income tax purposes under sections 191 and 3797(a)(2) of the Internal Revenue Code of 1939, as amended, and that the earnings of the business, Spiesman & Sons, are primarily attributable to the services of Mathew J. Spiesman, Jr., and your capital contributions; and further, that to no substantial extent are such earnings attributable to either capital or services of any of said minor children.

(b) Net gain from sales of capital assets decreased

Since it is held that there is now a capital loss carry-over from 1951 to 1952, taxable income for 1952 is accordingly reduced by \$885.09. Computation is as follows:

| | |
|--|--------------|
| Net short-term capital loss—per return | (\$ 221.60) |
| Add capital loss carry-over from 1951 | (1,755.08) |
| | ===== |
| Total | (\$1,976.68) |
| Less net long-term capital gain—per return— at 100% | 1,961.59 |
| | ===== |
| Net capital loss deduction, as adjusted | (\$ 15.09) |
| Net capital gain reported on return | 870.00 |
| | ===== |
| Reduction of 1952 taxable income | (\$ 885.09) |
| | ===== |

Computation of Income Tax

| | |
|--|-------------|
| Net income as adjusted | \$54,648.65 |
| Less exemptions (5 times \$600.00) | 3,000.00 |
| | ===== |
| Balance subject to tax | \$51,648.65 |
| | ===== |

| | |
|---|-------------|
| One-half of \$51,648.65—joint return | \$25,824.33 |
| Tax on \$25,824.33 | \$11,880.06 |
| Total tax liability—2 times \$11,880.06 | \$23,760.12 |
| Assessed: Liability disclosed by return— original account No. AF 702924— Idaho | 9,703.92 |
| Deficiency | \$14,056.20 |
| Liability for penalty: Section 294(d) (2), Internal Revenue Code: Total tax liability as adjusted\$23,760.12 | |
| Less: Tax withheld\$ 824.40 | |
| 1952 estimated tax 6,500.00 | 7,324.40 |
| Balance | \$16,435.72 |
| Penalty—6% of \$16,435.72 | \$ 986.14 |

Received and filed January 28, 1955, T.C.U.S.

Served January 31, 1955.

[Title of Tax Court and Cause.]

Docket No. 56141

ANSWER

Comes now the Commissioner of Internal Revenue, by his attorney, R. P. Hertzog, Acting Chief Counsel, Internal Revenue Service, and for answer to the petition filed herein, admits, denies and alleges as follows:

1. Admits the allegations contained in paragraph I of the petition.

2. Admits the allegations contained in paragraph II of the petition.

3. Admits the allegations contained in paragraph III of the petition.

4. Denies that he erred in his determination of the deficiencies in income tax and penalties as shown by the notice of deficiency from which the appeal is taken. Specifically denies that he erred in the manner and form as alleged in paragraph IV (a) to (i), inclusive, of the petition.

5. (a) Admits the allegations contained in paragraph V (a) of the petition.

(b)(1) Admits that the petitioners included in the gross income reported in their Federal income tax return for the taxable year 1951 partnership income in the total amount of \$34,878.41. Admits that petitioners in said return claimed as a page 3 deduction an item listed as "Bad Debt Losses-Personal Loans" in the amount of \$3,411.00. For lack of sufficient knowledge or information upon the basis of which to form a belief as to the truth or falsity thereof, denies the remaining allegations contained in paragraph V(b)(1) of the petition.

(b)(2) Admits the allegations contained in paragraph V(b)(2) of the petition.

(c)(1) For lack of sufficient knowledge or information upon the basis of which to form a belief as to the truth or falsity thereof, denies the allega-

tions contained in paragraph V(c)(1) of the petition.

(c)(2) Alleges that a partnership return for Spiesman and Sons for the period from December 1, 1951, through December 31, 1951, was filed showing a net income of \$3,254.30, and as thus qualified admits the allegations contained in paragraph V(c)(2) of the petition.

(c)(3) for lack of sufficient knowledge or information upon the basis of which to form a belief as to the truth or falsity thereof, denies the allegations contained in paragraph V(c)(3).

(c)(4) Admits that for the taxable year ending December 31, 1952, the partnership of Spiesman and Sons filed information returns on Form 1065 showing a net income of \$46,021.71. Denies the remaining allegations contained in paragraph V(c)(4) of the petition.

(d) to (h), inclusive. For lack of sufficient knowledge or information upon the basis of which to form a belief as to the truth or falsity thereof, denies the allegations contained in paragraph V(d) to (h), inclusive, of the petition.

(i) Denies the allegations contained in paragraph V(i) of the petition.

(j) For lack of sufficient knowledge or information upon the basis of which to form a belief as to the truth or falsity thereof, denies the allegations contained in paragraph V(j) of the petition.

(k) Admits the allegations contained in the first two sentences of paragraph V(k) of the petition. Denies the allegations contained in the third sentence of paragraph V(k) of the petition. Admits the allegations contained in the last sentence of paragraph V(k) of the petition.

(l) Denies the assumptions, allegations and conclusions contained in paragraph V(1) of the petition.

(m) Denies the allegations contained in the last subparagraph, entitled "Penalty Issue," of paragraph V of the petition.

6. Denies generally and specifically each and every material allegation contained in the petition not hereinbefore specifically admitted, qualified or denied.

Wherefore, it is prayed that the petitioners' appeal be denied and that the Commissioner's determination of the deficiencies and penalties be approved.

/s/ R. P. HERTZOG,
Acting Chief Counsel,
Internal Revenue Service.

Filed: March 15, 1955, T.C.U.S.

[Title of Tax Court and Cause.]

MINUTES OF PROCEEDINGS
OCTOBER 8, 1956

Action: Submitted on stipulation of facts.

Filed at hearing: Stipulation of facts with joint Exhibits 1-A thru 7-G. Notice to Produce.

Petitioner's brief: Nov. 23, 1956; Jan. 8, 1957.

Respondent's brief: Dec. 24, 1956.

Witnesses for Petitioner:

Mathew J. Spiesman, Sr.,

Mathew J. Spiesman, Jr.,

Kenneth Esmay.

Witnesses for Respondent.

Claude F. Flower.

Petitioner's Exhibits:

8. Photostat copy of magazine article titled "Should You Buy Shares in America."

9. Copy of Partnership Agreement as of first day of Feb., 1950, by & between M. J. Spiesman, Jr., all of St. Maries, Benewah County, Idaho.

10. Original Partnership Agreement as of 1st Dec., 1951, by & between Mathew James Spiesman, Sr.; Mathew James Spiesman, Jr.; Michael Joseph Spiesman; Mathew James Spiesman, III; Philip James Spiesman; Leonard John Spiesman; & Francis Edw. Spiesman.

11. Certificate titled "Letters of Guardianship."
12. Certificate titled "Letters of Guardianship," Francis Edw. Spiesman, minor.
13. Copies of Annual Inventory & Accounting. Nine separate groups.
14. Order settling inventory & accounting & report of Guardian.
15. Ident.: Not offered in evidence.
- 16 thru 20. Duplicate deposit slips, dated 3-17-52, Savings Dept. of Farmers & Merchants Bank of Rockford, in the respective order. Phillip James Spiesman; Francis E. Spiesman; Michael Joe Spiesman; Mathew J. Spiesman, III; Leonard John Spiesman.
21. Letter from Farmers & Merchants Bank of Rockford, Rockford, Wash., showing dates cleared the bank & signed by Claude F. Flower.
22. Ident.: Not offered in evidence.

Respondent's Exhibits:

- H. Original certificate, 10 pages, certified copies of Guardianship proceedings relating to four minor children of the petitioner.
- I. Bank record of Spiesman & Sons, St. Maries.
- J. Record of savings account of Philip J. Spiesman, Farmers & Merchants Bank.
- K. Record of savings account of Michael Joe Spiesman, Farmers & Merchants Bank.

L. Record of savings account of Mathew J. Spiesman, III, Farmers & Merchants Bank.

M. Record of savings account of Leonard John Spiesman, Farmers & Merchants Bank.

N. Record of savings account of Francis E. Spiesman, Farmers & Merchants Bank.

Note: Respondent's exhibits were offered into evidence as the originals, I thru N, and they are now to be replaced with photostat copies. (10/8/56.)

/s/ ROY E. MAY,
Deputy Clerk.

[Title of Tax Court and Cause.]

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys of record, that the following facts are true and that the same may be so considered and accepted by the Court as offered in evidence by the parties at these proceedings; provided, however, that the stipulation shall be without prejudice to the right of either of said parties to introduce other and further evidence.

1. Petitioners are husband and wife residing at St. Maries, Idaho. Joint federal income tax returns of petitioners for the calendar years 1951 and 1952 were filed with the then Collector of Internal Revenue for the District of Idaho, for the calendar year 1951, and with the District Director of Internal Revenue, Boise, Idaho, for the calendar year

1952. Attached hereto and made a part hereof as Exhibits 1-A and 2-B are true and correct copies (photostatic) of said joint individual income tax returns of petitioners for the calendar years 1951 and 1952, respectively.

2. On Schedule C of their joint income tax return for the calendar year 1951, petitioners reported the amount of \$34,878.41 as income from partnerships. Attached hereto and made a part hereof as Exhibits 3-C, 4-D, and 5-E are true and correct copies (photostatic) of a partnership information return (Form 1065) of Mathew J. Spiesman, Sr., and Jr., for the taxable period beginning January 1, 1951, and ending December 1, 1951; a partnership information return (Form 1065) of the Spiesman & Resor Pool Hall for the calendar year 1951; and a partnership information return (Form 1065) of Spiesman & Sons for the taxable period beginning December 1, 1951, and ending January 1, 1952, respectively.

3. On Schedule C of their joint income tax return for the calendar year 1952, petitioners reported the amount of \$17,079.25 as income from partnerships. Attached hereto and made a part hereof as Exhibits 6-F and 7-G are true and correct copies (photostatic) of a partnership information return (Form 1065) of Spiesman & Sons for the calendar year 1952, and of Spiesman & Resor Pool Hall for the calendar year 1952, respectively.

4. Included in the total amount of partnership income reported by petitioners in their joint income

tax return for the calendar year 1952, was the sum of \$136.64 which represented the petitioners' share of the ordinary net income of the Spiesman & Resor Pool Hall partnership, all as set forth on Schedule K of Exhibit 7-G, above. It is agreed by and between the parties hereto that adjustments should be made to the ordinary partnership income as reported in Exhibit 7-G due to an inadvertent under-statement of partnership gross receipts and omissions of credit sales of merchandise. The parties further agree that the petitioners' correct share of the distributable income from the Spiesman & Resor Pool Hall partnership for the calendar year 1952 is \$1,236.29.

5. On their joint income tax return for the calendar year 1951, petitioners claimed as a miscellaneous deduction on page 3 thereof the sum of \$3,411.00 which amount was described on said return as "Bad Debt Losses-Personal Loans." It is hereby conceded by petitioners that only \$3,111.00 of the \$3,411.00 claimed on said return became worthless during the calendar year 1951. Petitioners further concede that the balance of \$3,111.00 actually represents non-business bad debts which should be treated under the applicable provisions of the Internal Revenue Code of 1939 as a short term capital loss.

6. By an amended Declaration of Estimated Tax (Form 1040-ES) dated January 15, 1952, and filed with the then Collector of Internal Revenue for the

District of Idaho, petitioners estimated their income tax for the calendar year 1951 to be \$9,500.00. Petitioners paid the amount of \$9,500.00 on their estimated income tax for the calendar year 1951 and paid \$657.60 as an amount withheld from wages and salaries by an employer during 1951.

7. By an amended Declaration of Estimated Tax (Form 1040-ES) dated January 15, 1953 and filed with the District Director of Internal Revenue, Boise, Idaho, petitioners estimated their income tax for the calendar year 1952 to be \$6,500.00. Petitioners paid the amount of \$6,500.00 on their estimated income tax for the calendar year 1952 and paid \$824.40 as an amount withheld from wages and salaries by an employer during 1952.

/s/ **MYRON E. ANDERSON,**
Counsel for Petitioners.

/s/ **JOHN POTTS BARNES,**
Chief Counsel, Internal Revenue Service, Counsel
for Respondent.

Filed at hearing October 8, 1956.

The Tax Court of the United States
Docket No. 56141

In the Matter of:

MATHEW J. SPIESMAN, JR., et al.,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PROCEEDINGS

Monday, October 8, 1956

The above-entitled matter came on for hearing,
pursuant to Calendar Call, at 10:45 o'clock a.m.

Before: The Honorable J. Gregory Bruce.

Appearances:

MYRON E. ANDERSON,
On Behalf of the Petitioner.

WENDELL M. BASYE,
On Behalf of the Respondent.

The Court: Are you ready to proceed in the case
of Mathew J. Spiesman, Jr., and others, Docket No.
56141?

Mr. Andersen: Yes, Your Honor.

Mr. Basye: Respondent is ready for trial.

The Court: Will you announce your appear-
ances again for the record.

Mr. Andersen: Myron E. Andersen for petitioner.

Mr. Basye: Wendell Basye, counsel for respondent.

The Court: Very well. Does the petitioner wish to make an opening statement?

Mr. Andersen: Yes, Your Honor.

There were three issues in this case when we started, a bad debt issue, a family partnership issue and penalty for underestimating. We have conceded the bad debt issue, so there will be just the two issues, and the main one being the family partnership.

The Court: You are conceding the issue with respect to bad debt?

Mr. Andersen: That is right. We had taken the position that \$691 was a business bad debt, the government had taken the position that it was a non-business bad debt, and we have conceded rather than argue.

The Court: According to your pleadings, there was a total amount of \$3,411. [3*]

Mr. Andersen: That is right.

The Court: You are now conceding that the respondent's contention—

Mr. Andersen (Interrupting): There were \$300 which we conceded in the petition was not deductible at all.

The Court: Not deductible at all. And the balance is a non-business bad debt?

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

Mr. Basye: The \$300 was alleged in the petition to have not become worthless at all, but later recovered, so it was in the amount of 3,100-some dollars which was originally in issue.

The Court: The \$3,411 with the \$300 taken off of that, the remaining amount, then, the petitioner is conceding, represents a non-business bad debt?

Mr. Basye: Yes, sir.

The Court: All right.

Mr. Andersen: The main issue in this case, of course, is that it is a family partnership, is whether or not the petitioner's children, five minor children, are partners in the business known as Spiesman & Sons. The Commissioner of Internal Revenue has taken a position that they were not partners and proposed to tax the children's share of the distributable income from said partnership to petitioners. The applicable section of the Internal Revenue Code is 6191 and 379(a)(2) 1939 Code as amended by Section 340(a) and (b) of the Revenue Act of 1951. The effective date of the said Act as it pertains [4] to this case is January 1, 1951, so that, inasmuch as the years of '51 and '2 are involved, they are under the new Partnership Rule, Family Partnership Rule.

The partnership of Spiesman & Sons was formed on December 1, 1951, for the purpose of owning and operating gaming and amusement devices.

The Court: Organized when?

Mr. Andersen: December 1, 1951.

The Court: Go ahead.

Mr. Andersen: Prior to the formation of the

partnership of Spiesman & Sons there was a partnership conducted by Mathew J. Spiesman, Sr., and Mathew J. Spiesman, Jr., and that was known more commonly as Spiesman & Spiesman, that is, the grandfather, the father of the children, and of course there were the children.

We will show that the equipment owned by the partnership of Spiesman & Spiesman was owned equally by the partners, that is, the father and grandfather, and that the income from that partnership was divided one-third to M. J. Spiesman, Sr., and two-thirds to M. J. Spiesman, Jr.

The Court: Although they owned the—

Mr. Andersen (Interrupting): They owned the assets—

The Court: They owned the assets equally?

Mr. Andersen: Equally. The division of profit. That partnership ended on December 1, 1951, and the new [5] partnership, bringing in the minor children, began on that date.

We will show that Mathew J. Spiesman, Sr., was dividing his estate, and he had made gifts of his interest, a portion of his interest, in the equipment to the minor children.

One important point, I think, that is very obvious here is that the income that the children received was taxed for the year or for the period beginning after December 1, 1951, through 1952, to the father instead of any of it being taxed back to the grandfather, Mr. M. J. Spiesman, Sr.

I think that is all I have to say with regard to the family partnership.

On the penalty for underestimating well, we believe there is reasonable cause and we will show reasonable cause. However, it has been the policy of this office here to take the position that it's been mandatory that it be put on. I think that is all, Your Honor, on the opening statement.

The Court: Does the respondent wish to make a statement?

Mr. Basye: If the Court please. Your Honor, we are substantially in agreement with the opening statement of the petitioner. Actually the tax years involved in the proceeding are 1951 and 1952. In the deficiency notice sent out in this case, a deficiency in income tax was asserted for the year 1951 in the amount of \$2,155.22, for the year of 1952 in the amount of \$14,056.20. There were also assertions of added [6] amounts, as involves the year 1951, \$693, and for the year 1952, \$986.14.

As pointed out by the petitioner, the case does involve the recognition of five minor children, which, we think evidence will be shown, that at the time were 2 and 12 years old, as partners in a partnership which was conducting the operating and maintenance of certain slot machines, gaming devices and other coin-operated amusement devices. In this regard, it is the respondent's position in the case that, first, from all the circumstances surrounding the acquisition and alleged ownership of a capital interest in Spiesman & Sons partnership by the five minor children of petitioner, we believe, we would lead to the conclusion that the interest of the minors in the partnership does not meet the various tests

laid down in Section 39.191-B-8 of Treasury Regulations 118.

The Court: What regulation is that?

Mr. Basye: Regulations 118, Section 39.191-B-8, dealing with interests of minors in partnership.

The Court: Very well.

Mr. Basye: The second position of the respondent, Your Honor, is that we ask the Court to take judicial notice of Section 50-1504 of the Idaho Code, dealing with the licensing during the years involved of the coin-operated amusement devices which, in this case, involve income to the partnership. [7] On this point, it is the respondent's position, Your Honor, that only M. J. Spiesman, Jr., the petitioner in this case, could under the Idaho law legally hold any right, title or interest in these various coin-operated devices, and secondly, that he was the only partner in the partnership who could, under the Idaho law, legally receive any rentals or remunerations from the operation of such devices.

It is the third position of respondent in this case, Your Honor, that to no substantial extent are the earnings of the business of Spiesman & Sons partnership attributable to either the capital or services of the five minor children.

The Court: You may call your first witness.

Mr. Andersen: Mr. M. J. Spiesman, Sr.

Mr. Basye: One moment, Your Honor.

There is a stipulation of facts to be entered in this case.

The Court: Is it ready?

Mr. Andersen: Yes, Your Honor.

The Court: Are you offering the stipulation?

Mr. Andersen: Yes, Your Honor.

The Court: All right, the parties are offering a stipulation of facts, to which are attached numbers—

Mr. Basye: Exhibits through 6-G, I believe, or 7-G, respectively—yes, sir, 1-A through 7-G, respectively. [8]

The Court: To which are attached Exhibits 1-A through 7-G, inclusive. The stipulation of facts, together with the exhibits attached thereto, will be received in evidence and made a part of the record herein.

(Petitioner-Respondent Exhibits Nos. 1-A through 7-G, respectively, were marked for identification and received in evidence.)

Mr. Andersen: Mr. M. J. Spiesman, Sr.

Mr. Spiesman, Your Honor, does not hear too well.

The Court: Very well.

M. J. SPIESMAN, SR.

was called as a witness on behalf of the petitioners and, having been first duly sworn, testified as follows:

The Clerk: Will you state your name, please?

The Witness: Mathew J. Spiesman.

The Clerk: Junior or Senior?

The Witness: Senior.

(Testimony of M. J. Spiesman, Sr.)

Direct Examination

By Mr. Andersen:

Q. Where do you reside?
A. St. Maries, Idaho.
Q. How old are you, Mr. Spiesman?
A. I will be 80 in January.
Q. Are you now married? A. No.
Q. You are a widower? [9] A. Yes.
Q. What is your nickname? A. Heinie.
Q. That is what you go by mostly, isn't it?
A. Yes.

Mr. Andersen: We may have to use it from time to time to keep the Spiesmans straight.

Q. (By Mr. Andersen): Do you have any children? A. Yes.

Q. How many? A. One.
Q. What is his name?
A. Mathew J. Spiesman, Jr.
Q. And your son and his wife are the petitioners in this case? A. Yes.
Q. Do you have any grandchildren?
A. Five.
Q. Can you give their names and ages?
A. I can try. Michael Joe Spiesman.
Q. How old is he?
A. He will be 16 this month, I believe. Yes.
Q. And the next one?
A. Phillip James Spiesman. [10]
Q. How old is Phillip? A. Thirteen.

(Testimony of M. J. Spiesman, Sr.)

Q. And the next one?

A. Leonard John Spiesman.

Q. How old is he? A. Well, I—

Q. You can look at your notes if they are in your own handwriting.

A. I wrote it down, figuring you would ask me that, and some others I—

The Court: I think you can agree on it. How old is he?

Mr. Andersen: I will have to look here.

A. Leonard John is 11 years old.

Q. (By Mr. Andersen): Then who is the next one? A. Mathew James.

Q. Mathew James Spiesman?

A. Ten years old.

Q. We call him Mathew III, don't we, as a rule?

A. Yes.

Q. And the next one?

A. And Francis Edward, 6.

Q. That is their ages at the present time?

A. At the present time. [11]

Q. At the time you formed the partnership their ages would have been: Michael Joe 11; Phillip 8; Leonard 6 Years 9 months; Mathew, III, 5 years 5 months; and Francis 1 year 2 months, is that right?

A. I think so, right, yes.

Q. What is the approximate population of St. Maries, Idaho?

A. About 2 thousand, I believe.

Q. It's a very small town? A. Yes.

Q. What is the principal industry?

(Testimony of M. J. Spiesman, Sr.)

A. Logging and lumbering.

Q. Then it is a seasonal, what you might call a seasonal town? A. Seasonal, yes.

Q. How long have you resided in St. Maries?

A. Well, I first came there in December of 1911, but I expect my residence would date from January, 1912.

Q. That would be about 44 years.

What is your present occupation, or what do you do?

A. Well, I am working in the Gem State Club, and I believe that is about all.

Q. Well, you are a partner in Spiesman & Sons?

A. Spiesman & Sons, yes.

Q. You were in business in St. Maries. When did you [12] begin business?

A. January, 1912.

Q. What kind of business was that?

A. It was a cigar store, billiard parlor, amusement place, I suppose.

Q. And you continued this business until when?

A. Well, I sold it to Dean Marty—well, I don't know—I believe in 1935.

Q. Was your son, Mathew James Spiesman, Jr., living with you at that time, in 1935? A. No.

Q. Where was he?

A. He was occupied in his profession, he was a professional ball player.

Q. He was away playing professional ball?

A. Yes.

(Testimony of M. J. Spiesman, Sr.)

Q. After you sold your business in 1935 did you stay in St. Maries or did you leave?

A. What?

Q. After you sold your business in 1935 did you leave or did you stay in St. Maries?

A. Well, I left St. Maries for a trip East and South into Florida, and I believe I brought, at the same time, his present wife rode with me, and they were married on the road.

Q. And when did you return to Idaho [13] again? A. In 1936.

Q. And you returned to St. Maries?

A. Yes.

Q. When did your wife pass away?

A. In 1937.

Q. Your son came home to his mother's funeral?

A. Yes.

Q. At that time did your son indicate to you what his plans were?

A. Well, yes, he figured that he was, he didn't want to play professional baseball any more, that he would like to get into business, and he would like to get into the same business that I had before I sold out.

Q. Did you make him any offer at that time?

A. Well, I told him that I would back him for to get an interest in the business, if we could buy it back.

Q. Did he ever take you up on the offer?

A. Yes.

Q. About when was that?

(Testimony of M. J. Spiesman, Sr.)

A. Well, that was, I believe, in 1938.

Q. And at that time did you make him a loan or a gift? A. Yes.

Q. Which was it, a loan or a gift? Did you make him a gift at that time? A. It was a gift. [14]

Q. Do you recall how much it was?

A. Well, closely, I believe—now, it's kind of hard for me to say that—it was around 23 hundred and some odd dollars, I believe.

Q. Twenty-three hundred seventy-five dollars is what you have reported.

The Court: What did he—

Mr. Andersen: He made a gift to his son in 1938 of \$2,375.

The Court: You said, "That is what you reported," is that right?

Mr. Andersen: I don't think it was reported as a gift tax, because it was under \$3,000, Your Honor. Honor.

The Court: I wondered why you were prompting the witness there, Mr. Andersen.

Mr. Andersen: I will try and keep from it, Your Honor.

Q. (By Mr. Andersen): At that time did he buy any business?

A. He bought a half-interest in my former business from Dean Marty.

Q. Was there a partnership formed then, at that time?

A. Resor, a gentleman by that name, bought the

(Testimony of M. J. Spiesman, Sr.)

other half and they formed a partnership of Spiesman and Resor.

The Court: You didn't have any interest in [15] that firm yourself at that time, then?

The Witness: No.

The Court: Proceed.

Q. (By Mr. Andersen): Have you made any further gifts to your son, Mathew, Jr.?

A. Yes.

Q. Would you tell the Court what gifts you have made subsequent to that to your son?

A. What?

Q. Can you tell the Court what gifts you have made since 1938 to your son, Mathew?

A. Well, not offhand, but I could look it up. I believe I have got notes to that effect, if I can look at them.

Q. You may look at them.

Mr. Andersen: Is that all right, Your Honor?

The Court: What kind of notes is it he is referring to?

Mr. Andersen: Show them to His Honor.

The Court: Are they records which he made at the time of the gifts?

The Witness: These here on here are records that I made off and on at the time I gave them.

The Court: At the time you gave the gifts you made a record of the date you gave them and the—[16]

The Witness: Shortly afterwards. Not at the time.

(Testimony of M. J. Spiesman, Sr.)

The Court: I mean, it isn't something you have gotten together and put down from recollection in the last year or two or three years, is it?

The Witness: No.

The Court: It is records that you made substantially contemporaneous with the time when you made the gifts, is that it?

Mr. Andersen: Your Honor, I don't think he understands you. He made gifts and he has filed——

The Court: He seems to have understood.

Mr. Andersen: May I make one statement? He has filed gift tax returns on the gifts in excess of \$3,000 but they were not filed on time, your Honor, they were filed, I believe, in 1953, and I believe the Court should know that.

The Court: I wanted to know if the notes he is looking at for the purpose of testifying from them at the present time are notes that have been gotten together for the purpose of this trial or whether they are records of events that took place, records made at the time or substantially at the time when the transactions took place.

The Witness: These records——

Mr. Andersen: Your Honor, the record, either in stock certificates or the deeds of the property, are what he took that from. [17]

The Court: All right, you go ahead with your examination. Those matters have a little bit to bear upon the weight to be given testimony, but there has been no objection to your proceeding as it is, so go ahead.

(Testimony of M. J. Spiesman, Sr.)

Q. (By Mr. Andersen): The gifts you have made to your son?

A. That was real estate, I made a gift of a house, lot 11, block 2, original, in the townsite.

Also, before I made him that gift, I had to fix it up and put a little extra money on it, and one thing and another.

Q. We are only interested in the type of property you gave him and the date you gave it to him or the approximate date.

A. That was in 1943, that I made him that gift.

Q. Have you made any other gifts after that?

A. After that, why—well, on July 1, 1940, I gave him another building next to it.

Q. Would you look at that and—would look at the date. I don't believe you gave the right date.

A. What?

Q. I don't believe you gave the right date.

A. July 1, 1945, that I gave him the other house, and it was situated right next to the first one that I gave him.

Q. And what other gifts?

A. And it was some time, quite a while, before I made [18] any more gifts to him. On January 14, I believe, I gave him 500 of Bunker Hill to give to Jimmy.

Q. You didn't give the date, though, as to the year.

A. Oh, that was January 14, 1946.

Q. You gave 500 Bunker Hill?

A. Yes.

(Testimony of M. J. Spiesman, Sr.)

The Court: What do you mean by that?

Q. (By Mr. Andersen): Five hundred shares of Bunker Hill & Sullivan Mining Company stock?

A. Yes.

The Court: You gave that—I didn't get it clear who he gave it to. To his son?

Mr. Andersen: To his son.

The Court: All right.

Q. (By Mr. Andersen): Did you make any further gifts to your son?

A. Not that I know of. I have no—

Q. How about 1955?

A. I already told about that.

Q. '45 you gave us, but not '55. A. 1953?

Mr. Basye: Respondent can't tell whether the witness is answering the questions from his own independent knowledge or not. I hate to interpose an objection just on the ground [19] of leading the witness, but—

The Court: Well, with respect to the last question, the year 1955 is not involved in this case. Why are we bringing that out?

Mr. Andersen: Just to show his pattern of making gifts at all, distributing his estate.

The Court: There is no need to go into 1955 because it is not involved.

Mr. Andersen: All right.

Q. (By Mr. Andersen): Have you made other gifts?

A. I have made gifts to the children.

(Testimony of M. J. Spiesman, Sr.)

Q. Would you tell the Court who you made the gifts to and when?

A. I can by looking at the records. I will have to go over the records and find it.

In 1945 I gave Leonard John 400 Bunker Hill & Sullivan stock and a hundred Sunshine. And in 1945 I gave—

The Court: Just a moment. When you just say "Bunker Hill & Sullivan" and "Sunshine" it doesn't mean too much to the Court. Maybe I have an idea of what you are talking about, but I want a record here so other people will know. I know what Sunshine Mining Company is and what Bunker Hill & Sullivan Mining Company is, but that isn't a good record. It might be some other kind of Sunshine. [20]

Q. (By Mr. Andersen): Would you—

A. In 1945 I gave Leonard John 400 Bunker Hill & Sullivan Mining stock and 100 of Shine. In the same year, 1945, I gave Leonard John 400 Bunker Hill & Sullivan Mining Company stock and 100 Sunshine Mining Company stock. And in '45, the same year, I gave Michael Joe 400 Bunker Hill & Sullivan Mining stock. And in 1946 I gave Phillip James 400 Bunker Hill Mining stock and 100 shares of Sunshine Mining stock. And in 1946 I gave Michael Joe a hundred shares of Sunshine Mining stock. And in '46 I gave Leonard John Spiesman a hundred shares of Sunshine Mining stock. And in 1951 I gave Mathew James 300 shares of Sunshine Mining and in 1951, in December, I gave the five

(Testimony of M. J. Spiesman, Sr.)

kids—all five of them—thirty-five ninetieths (35/90) of my, 35/90 of the equipment of Spiesman & Spiesman.

Mr. Andersen: I think I will stop him there, your Honor, because these other gifts are after the years in question.

The Witness: Here is another notation, in '55, that I gave my son 100 shares of Homestake Mining Company stock and 100 shares of Hecla.

Q. (By Mr. Andersen): That was your son, but that was not involved, so—

A. No, I understand now that that is not involved anyway.

Q. What was the purpose of, Mr. Spiesman, you making [21] these gifts to your son and grandchildren?

A. Just a moment. Does it make any difference about other gifts, besides the mining stock? I did give—well, I don't know what year that would be, but I gave them—

Mr. Andersen: I think I would like to get this in.

A. (Continuing): —to Francis Edward and Mathew James—I don't know what year it was.

Q. What year did you give them—

A. I gave them a mortgage on the house, the mortgage was for \$10,000.

Q. You gave each a \$5,000 interest in the mortgage? A. A half-interest in the mortgage.

Q. Would you give the year that you did that?

A. I don't know. I don't know if I marked that

(Testimony of M. J. Spiesman, Sr.)

down or not. I took some notes from the records, to find out.

Q. Well, that is afterwards anyway. Let's pass it.

A. Well, here it is. It's 1953, I gave Mathew James a third, one-half interest in the Chase mortgage, its value, mortgage value, was \$10,000, so I gave each of them a half-interest, to him, and the other half to Francis Edward.

Q. So that they each had a \$5,000 interest in that mortgage?

A. Each \$5,000 in that mortgage.

Q. What was the purpose of making gifts to your son and grandchildren? [22]

A. Well, the purpose of making all these gifts to my grandchildren was that I am getting pretty old, and I figured to dispense with a lot of legal work or anything else and give what I had to where it belonged, to the children mostly.

Q. Mr. Spiesman, in your gifts had you made any attempt to try and equalize the gifts—I call your attention to the fact that on the first gifts there were two of the children who weren't in existence yet at that time. Would you explain that to the Court?

A. That was probably the reason, that would be the reason, that was the reason that I gave some of the stock, I believe 500 shares of Bunker Hill, to my son to be given those children later, or in case. And I also, as time went on, I could see where things weren't being equal, stocks were fluctuating, some was going up and some was going down, and I tried to speak to him and see if he could equalize them

(Testimony of M. J. Spiesman, Sr.)

things, I tried to keep all of the children equal. And, in addition to that, when I made my will out—that will isn't here as evidence, I don't suppose I can show it, but I did have it in there, what I had left should go to the children, to make them all as equal as possible, to equalize all that I had left.

Q. What you meant by "equal," you wanted each one of the children to have 400 Bunker Hill and perhaps so many Sunshine and—is that the way you had it figured?

A. Not too much that, no. I wanted them to equalize [23] it in value, that is, if the four hundred shares of Bunker Hill was down to 10 and the Sunshine was up to 20, I wanted the rest of my estate to equalize that stuff with them, that is, to equalize them all, where they would all be worth the same amount of money, by taking what I had left and dividing it that way.

Q. And that was as to your five grandchildren?

A. That was as to my five grandchildren.

Q. Mr. Spiesman, I hand you a U. S. News & World Report dated October 5, 1951, and ask you to turn to page 68 and tell me what this is (indicating).

Mr. Basye: Your Honor, we will stipulate that that is the U. S. News & World Report, but I think that the magazine speaks for itself, what it says in there. I don't see any purpose of counsel's—

The Court: I think it does identify itself. You have identified it.

Mr. Andersen: Yes. Then I would like to intro-

(Testimony of M. J. Spiesman, Sr.)

duce it in evidence, but I would like to ask him a few questions about it.

Mr. Basye: We have no objection to him introducing it in evidence, your Honor. I just think that the magazine speaks for itself.

The Court: You do not object?

Mr. Basye: No, sir. [24]

The Court: Are you offering this magazine?

Mr. Basye: I am not offering it.

The Court: Are you offering this magazine in evidence?

Mr. Andersen: Yes, your Honor.

The Court: For what purpose?

Mr. Andersen: For the reason that this is where the gentleman first got his idea for starting a family partnership, and this relates to an enactment of the new law liberalizing the family partnership rule.

The Court: Can't you get at that without introducing a magazine?

Mr. Andersen: I suppose I can. I will go ahead then. But I thought it might be important that the Court see the magazine article.

The Court: Well, don't introduce the magazine, in any event. I don't want to have to read or look at the whole magazine. Can you refer to any specific article on a definite page of it and offer that portion of it only, if that is what you are going to offer?

Mr. Andersen: Yes.

The Court: Let's make your offer before you go on into the evidence. I understand there is no objection to it. Offer it in evidence, the article, and de-

(Testimony of M. J. Spiesman, Sr.)

scribe what it is. That is the only part we are going to take in evidence. [25]

Mr. Andersen: I offer an article in the U. S. News & World Report, dated October 5, 1951, at page 68.

The Court: And the article is entitled what? Is it all on the one page?

Mr. Andersen: The article is entitled——

The Court: Is it all on the one page?

Mr. Andersen: No, your Honor. It covers 4½ columns.

The Court: Then I suggest that you cut it out of the magazine, paste it on a piece of paper and offer it that way.

Mr. Andersen: Your Honor, I have a photostatic copy.

The Court: And set forth the date, month and so forth, and the name of the magazine. Then the Clerk may stamp it as an exhibit. Right now let's consider that the offer is withdrawn and you will prepare the exhibit in proper form for submission. Go ahead and examine on it if you wish.

Mr. Andersen: Yes. I have a photostatic copy of this here that I could——

The Court: Of just the article?

Mr. Andersen: Yes. It will take me a second to find it.

Mr. Basye: I have a copy of it.

Mr. Andersen: This article is called "Partnership [26] Within Family May Save Tax."

Q. (By Mr. Andersen): Mr. Spiesman, did you

(Testimony of M. J. Spiesman, Sr.)

read this article? A. Yes.

Q. And could you tell me what your impression was when you read this article.

A. At the time I was giving my estate, you might say, away to the children, and I owned a 50 per cent interest in Spiesman & Spiesman, and I thought it would be a good idea to give that away to the children, too, if it could be formed into a partnership, and I asked my son what he thought of it and his idea about it, and in that way that was, as I, as close as I can figure it, the starting of the idea of the family partnership, it was obtained from that article.

Q. Did you do anything at that time with regard to starting a family partnership?

A. Yes. I believe I suggested to my son that he get busy, after he thought it was all right, and I believe that he did get busy—at least he made a trip to Boise to see some of the tax experts, or the tax people anyway—and see if it was all right to do that, and I believe then we got a favorable reply anyway, because we did—

Mr. Basye (Interrupting): I object to that, your Honor. I don't think the witness has any independent knowledge of what his son— [27]

The Court: I sustain the objection.

Mr. Andersen: You can't answer that part of it.

The Witness: What?

Mr. Andersen: I say, he won't allow you to answer that part of it, because it is not directly responsive to the question.

(Testimony of M. J. Spiesman, Sr.)

Q. (By Mr. Andersen): At that time, you stated that you had 50 per cent ownership in the assets of the Spiesman & Spiesman partnership.

A. Yes.

Q. Can you tell me in substance what the terms of that agreement were?

The Witness: I am hard of hearing, Judge. I don't get him until he gets closer.

The Court: Step a little closer to the witness.

Q. (By Mr. Andersen): Could you tell me in substance what the terms of the agreement were between your son and yourself? A. Roughly, yes.

Mr. Basye: Your Honor, I would like to inquire whether there is a written agreement or an oral agreement. He hasn't identified what—

The Court: Was that an agreement in writing?

The Witness: Yes. [28]

The Court: All right, he has answered it.

Mr. Basye: Are you going to offer this in evidence?

Mr. Andersen: Yes.

The Court: Before you proceed, Mr. Andersen, the Clerk has to get some numbers marked here. You already have one offer of an exhibit. Can we—

Mr. Andersen: Get that marked?

The Court: Can we get that marked so that we can keep the thing orderly here?

Have you any objection to that being clipped out of that magazine?

Mr. Andersen: No, your Honor.

The Court: Then let the Clerk stamp the first

(Testimony of M. J. Spiesman, Sr.)

page of it, and we will put it up to the Clerk to clip the other columns out of it and mark it as your exhibit.

Mr. Basye: I might be able to help him in that regard. I think this might be a photostat of that article.

The Court: That would be very convenient.

The Clerk: Is this the one you are going to submit now, this photostat, as an exhibit.

Mr. Andersen: I ask that that be introduced and marked in evidence as Petitioner's 8.

The Court: Now, you are referring to the article which appeared in the October 5, 1951, issue of the U. S. [29] News & World Report?

Mr. Andersen: That is right.

(Petitioner's Exhibit No. 8 was marked for identification.)

The Court: It is being offered in evidence as Petitioner's Exhibit No. 8, correct?

Mr. Andersen: Yes, that is correct.

The Court: It will be received in evidence, since there is no objection on behalf of the respondent.

(Petitioner's Exhibit No. 8 was received in evidence.)

Q. (By Mr. Andersen): You didn't answer my question as to what the substance of your agreement—

Mr. Basye: I object, your Honor. If there is a written agreement, the agreement speaks for itself.

(Testimony of M. J. Spiesman, Sr.)

It hasn't been offered yet. I don't know whether his name as a party appears on the agreement.

The Court: I will sustain the objection at this time.

All we have in the record is that there was an agreement between Mr. Spiesman, Sr., and his son, Mr. Spiesman, Jr., and that it was in writing .

Mr. Andersen: I offer this written agreement in evidence. I want to make one inquiry on it first before I offer it. [30]

The Court: Let me help you. Just stand where you are. I understand this is the first case you have tried before the Tax Court.

Mr. Andersen: Yes, sir.

The Court: Let me suggest that when you have an exhibit to offer you hand it to the Clerk, ask him to mark it for identification, and he will mark it and hand it back to you. Then get it identified, or if there is an agreement on it it can be marked, offered in evidence at that time, and then it is marked as an exhibit received in evidence.

Mr. Andersen: Thank you, your Honor.

The Court: But first it has to be identified so we will know what we are talking about.

The Clerk: This is Petitioner's Exhibit No. 9, so marked for identification.

(Petitioner's Exhibit No. 9 was marked for identification.)

The Court: Now, hand it to the witness and ask him if that is, the agreement or the document which

(Testimony of M. J. Spiesman, Sr.)

has been marked Petitioner's Exhibit No. 9 for identification, whether that represents the agreement between the witness and his son, to which he previously testified.

The Witness: I will look and see if I signed it.

The Court: All right, look back and see. You are the one who has to identify it.

The Witness: This is the agreement. [31]

The Court: Now, then, if you want to offer it in evidence, offer it.

Mr. Andersen: I want to ask one question.

Q. (By Mr. Andersen): There has been some alterations or writing, I don't know whether you would call them alterations, but I ask you if this amount of sixteen sixty-four fifty is your handwriting. A. Yes, sir, it is.

The Court: It isn't in evidence as yet.

Mr. Andersen: I offer this agreement in evidence.

Mr. Basye: I would like to take a look at the document, your Honor.

The Court: Very well.

Mr. Basye: In aid of a possible objection, may I inquire of the witness?

The Court: Yes.

Q. (By Mr. Basye): I ask you, Mr. Spiesman, whether this writing that appears on the face of Petitioner's Exhibit 9 for identification was made in your handwriting at the time the document was signed by you, or was that put on the document after you had signed it originally?

(Testimony of M. J. Spiesman, Sr.)

A. Which one do you mean?

Q. Or do you remember?

A. Which one do you mean? [32]

Q. This is a petitioner's exhibit for identification, No. 9, which I hand you. Just that pen-and-ink marking on the face of the instrument.

A. Well, the pen-and-ink marking was wrong, and what I paid was \$1,664, or half of it, for my share of the equipment.

The Court: Mr. Spiesman, when you put that handwriting, that writing that appears in ink there, on there?

The Witness: I put it on there directly after; as soon as this was written out to me and shown to me, I said "It's wrong."

The Court: Did you put it on before you signed it?

The Witness: I don't remember that.

The Court: What is the date of the agreement?

The Witness: The date of the agreement is October the 8th, 1956.

Mr. Andersen: That is the identification number.

The date of the agreement would be—

The Court: When did you execute it, when did you execute that?

The Witness: It was in February, 1st day of February, 1950.

The Court: February 1, 1950. Now, then, were those changes or what you have described as changes, which appear on the first page in ink, were they put

(Testimony of M. J. Spiesman, Sr.)

on there prior to the time you signed this, on February 1, 1950, or after? [33]

The Witness: Well, I don't remember now, but I know that when it was read to me the mistake was here, this mistake was made, and I put that in there.

The Court: And you had to make that change before you would sign it?

The Witness: Well, I don't know whether I signed it before or after.

The Court: Well, was it done at the same time, on the same occasion?

The Witness: It was done, I believe, on the same occasion.

The Court: Same day, at the time you were looking it over, reading it?

The Witness: As I got it, at the time I got it, I looked it over and saw this was, I seen these were wrong, that I had paid this much, not this much, but the half of this much, \$1,664 was the value of the machine, and half of it was what I paid.

The Court: Does that satisfy you?

Mr. Basye: Yes. He still hasn't offered it in evidence, your Honor.

The Court: Yes, he has made the offer. You asked to ask qualifying questions.

Mr. Basye: I have no objection to the document.

The Court: Petitioner's Exhibit No. 9 will [34] be received in evidence.

(Petitioner's Exhibit No. 9 was received in evidence.)

(Testimony of M. J. Spiesman, Sr.)

Mr. Andersen: May I ask him some more questions about this?

The Court: Yes.

Q. (By Mr. Andersen): Would you state the important substance as to this agreement, that is, as to the ownership and distribution of earnings?

A. Well, in the distribution of earnings, Mathew J. Spiesman was to get—

Mr. Basye: I think the instrument so states. I object.

The Court: Does the instrument so state?

Mr. Andersen: Yes, your Honor.

The Court: Then, the instrument is the best evidence on those points. I will sustain the objection.

Mr. Andersen: I ask that this be marked for identification as Petitioner's Exhibit No. 10.

The Court: The Clerk will give it a number. You just ask him to mark it for identification.

Mr. Andersen: Yes, your Honor.

The Clerk: Petitioner's Exhibit No. 10, so marked for identification.

(Petitioner's Exhibit No. 10 was [35] marked for identification.)

Q. (By Mr. Andersen): I hand you Petitioner's Exhibit No. 10 and ask you to look at it and tell me what it is.

A. What was the question, whether this was the agreement?

Q. What is that agreement?

(Testimony of M. J. Spiesman, Sr.)

A. This is the agreement for Spiesman & Sons, wherein we took the children into partnership.

Q. Took your five grandchildren into the partnership? A. Yes.

Q. Mr. Spiesman, I call your attention to some writing on this sheet, up there at the top, it's written over "Michael James"; that correct name is "Michael Joseph," is it not? A. What is this?

Q. The original document has been marked "Michael James," and it has been corrected to "Michael Joseph"?

A. Michael Joseph is right.

Q. Mr. Spiesman, there are some other alterations on this agreement. Would you explain to the Court—

A. There is one in here, wherein after reading it, I see where they had, at the time—shall I read it?

Q. You may read that clause if you wish.

A. "At the time of this agreement the assets to be [36] taken over by the partnership are in the possession and owned by the partners, Mathew James Spiesman, Jr."—and then my name was left out—"in the value of \$2,347.63." So my name being marked out, I owned half of the assets of Spiesman & Spiesman, that was being turned over, and there was a mistake made there, where it said above "the partners," in an oversight my name wasn't put in. And it seems like that there is—

Q. Who made the correction?

A. Well, I called attention to the fact and made the correction, and that ain't my writing, though.

(Testimony of M. J. Spiesman, Sr.)

Mr. Basye: I didn't hear the answer of the witness, your Honor. What was the last statement of the witness?

The Court: "I called attention to the fact and made the correction, and that ain't my writing, though."

A. (Continuing): It looks like Bud's writing. If the Judge would take a look at the two together, he could——

Mr. Andersen: He is probably not interested.

Q. (By Mr. Andersen): Would you tell us what the purpose of your name on the margin there is?

A. The purpose of my name on the margin was to make this OK that this here was put in, as I understand it. That's the reason I put it on the margin.

Q. Mr. Spiesman, would you tell the Court whether or not that was put on there at the time of the writing or at the [37] time shortly after they started making their examination of Bud, your son Bud?

A. Well, that is when I noticed the discrepancy there, was then.

Q. You didn't notice it at the time you signed the agreement? A. No, I did not.

The Court: What do you mean, at the time they started making the examination?

Mr. Andersen: Not at the time they started to make the examination, but after the examination had been, you might say.

The Court: Are you referring to an examination by the Internal Revenue Bureau?

(Testimony of M. J. Spiesman, Sr.)

Mr. Andersen: That is right.

The Court: Then, as I understand the witness—

That marginal notation of your name was made on that document, which has been identified as Petitioner's Exhibit No. 10, after the agents of the Bureau of Internal Revenue or the Internal Revenue Service began examining your son's income tax affairs?

The Witness: I looked up this agreement and found out my name wasn't on there, that only his name was put in there, yes.

Q. (By Mr. Andersen): [38] Mr. Spiesman, this agreement had been recorded? A. Yes.

Q. And this alteration was after the recording?

A. Yes.

Q. And it was in more or less of a memorandum form? A. Yes.

Mr. Andersen: Your Honor, we offer this in evidence, not as the recorded instrument, but as an instrument indicating their contract of agreement.

Mr. Basye: In order to aid myself in a possible objection to the instrument, I wonder if I could ask the witness one question, your Honor.

The Court: Very well.

Q. (By Mr. Basye): You stated that the change in the instrument, Mr. Spiesman, I believe, was not in your handwriting. Is that right?

A. If you will look at both of those together, they are so close together that I wouldn't swear to my own handwriting and his.

Q. But is your name signed, is that your signa-

(Testimony of M. J. Spiesman, Sr.)

ture on the instrument? Is that your signature there? A. Yes.

Q. One other question was, that you didn't discover this error, or you didn't change the instrument until some time—— [39]

A. (Interrupting): I didn't discover it until I read it carefully over afterward and seen that there was a mistake made there and I wasn't put in as a half-owner of Spiesman & Spiesman, which I actually was.

Mr. Basye: Any other objection or argument on this will have to be on cross-examination. I withdraw any objection to the introduction of this at this time.

The Court: Petitioner's Exhibit No. 10 will be received.

(Petitioner's Exhibit No. 10 was received in evidence.)

Q. (By Mr. Andersen): Mr. Spiesman, you were examined at the same time, were you not, that your son was examined, for the years of '51 and '52?

A. Yes.

Q. And did they make any changes on your report? A. No.

Q. They accepted your report as filed?

A. Yes.

Q. I ask you, Mr. Spiesman, did you report one-third of the income of the partnership of Spiesman & Sons for the period from December 1, 1951, when it was organized, to December 31, 1951?

(Testimony of M. J. Spiesman, Sr.)

November 30, 1951, when the partnership was ended? A. Yes. [40]

Q. Spiesman & Spiesman partnership was ended? A. Yes.

Q. I ask you, Mr. Spiesman, if you reported one-ninth of the income from this partnership of Spiesman & Sons for the period from December 1, 1951 when it was organized, to December 31, 1951.

A. Yes.

Mr. Basye: I object, your Honor, on the ground that we already have in evidence the partnership returns, and this man is not a petitioner in this proceeding. I don't see how it's relevant whether he reported it or not. It is on the partnership returns which are already in evidence.

The Court: The partnership returns are in evidence?

Mr. Basye: Yes, subject to stipulation.

The Court: And the reporting of the income is done on those partnership returns. Are his returns in evidence?

Mr. Basye: Are his returns in evidence? They are not.

The Court: As one of the exhibits attached to the stipulation?

Mr. Basye: They are not.

Mr. Andersen: My only point in bringing this out was that we are alleging that he made gifts of this income-producing property, of which this partnership is part, and I wanted to call attention to the

(Testimony of M. J. Spiesman, Sr.)

fact that they have not been [41] back and given or assessed any of the income to him but have left it all to the father, and that is my only point in bringing that out.

The Court: I will sustain the objection to the question.

Q. (By Mr. Andersen): At the time you were being examined did the examining officer ever explain to you why he disallowed the 1/9 interest of the income shown by the five children—

A. What was that question?

Q. Did the examining officer—that would be Mr. Straub—ever explain to you why he disallowed the 1/9 interest in the income of your son?

A. No.

Mr. Basye: I object, your Honor.

The Court: I sustain the objection.

Q. (By Mr. Andersen): Besides keeping the 1/9 interest in the partnership when you organized the firm of Spiesman & Sons, did you ever make any further contributions of capital to that partnership?

A. Yes.

Q. How much and when?

A. Well, I gave a hundred dollars to start a new capital after the capital of Spiesman & Spiesman was withdrawn. [42]

Q. You gave working capital to it?

A. Then I put in \$100. And whether the question goes further that the rest of them was supposed, whether the boys was supposed to put in a hundred

(Testimony of M. J. Spiesman, Sr.)

dollars and Mathew, Jr., why, he put in the rest to make a thousand dollars.

Q. He was only supposed to put in nine hundred, wasn't he?

A. Well, yes, but he put in an extra hundred, I believe.

Q. Is this partnership still in existence, Spiesman & Sons? A. Yes.

Q. Mr. Spiesman, are you anticipating putting any further capital into this partnership?

A. Yes.

Mr. Basye: I object.

The Court: I sustain the objection.

Q. (By Mr. Andersen): Mr. Spiesman, do you know anything about bookkeeping? Have you had any bookkeeping experience? A. Very little.

Mr. Andersen: Your witness.

The Court: Cross-examine.

Cross-Examination

By Mr. Basye:

Q. Mr. Spiesman, on your direct examination you testified [43] to certain gifts that you had made to your son, covering the period, I think, '38 thru '46. I ask you whether the gift to your son that you made in 1938 was, in the form of money, was to buy a business? A. Yes.

Q. And what was that business?

A. That was my old business that I had been in since 1911.

(Testimony of M. J. Spiesman, Sr.)

Q. And you had sold that business to someone else?

A. I had sold that business to another party, and that party put a price on it and offered to sell it back, and I bought, or gave 23 hundred dollars, or something like that—

Q. To your son?

A. I think it was \$2,375, to buy a half-interest, with another person named Resor.

Q. You had no interest in this business that your son used the money for? A. No.

Q. You then testified, I believe, Mr. Spiesman, concerning gifts that you made to the grandchildren.

A. Yes.

Q. Now, these gifts consisted of stock?

A. Yes.

Q. You mentioned certain shares of stock.

A. Yes. [44]

Q. I would like to know how you made these gifts. What evidence is there of the gift—I will ask you one specific question. Did you own stock certificates which you gave to the children and had them transferred in their name?

A. I owned the certificates, at Merrill, Lynch, Pierce, Fenner & Beane, and they were transferred to the children.

Q. I see. You didn't give them money or anything like that? A. No; I gave them the stock.

Q. You also stated that you have made gifts of a certain real estate mortgage that you held.

A. Yes.

(Testimony of M. J. Spiesman, Sr.)

Q. I want to know how you made that gift. What evidenced that gift?

A. Well, I had built the house, and the price of it was 13 thousand and some-odd dollars, it was for sale. I never did sell it. It was tough to get money from the bank at home for a G.I. mortgage, they just didn't seem interested in them kind of things, so it hung on for quite awhile and finally this man Chase offered to buy the building, the home, and wanted to know the price of it. I told him, I believe it was 13 thousand five hundred, and he paid the 3 thousand, or whatever the odd money was anyway. It left a mortgage for \$10,000, and that mortgage I turned over to my two grandchildren, Mathew James, Jr., Sub-Junior, whatever you would [45] call it—

Q. The Third (III) ?

A. Yes. And Francis Edward.

Q. Those are grandchildren of yours ?

A. Yes.

Q. The specific question I asked you was how you turned it over to them. How did you turn it over to them ?

A. I turned the mortgage that Chase gave me over to them, through a real estate office.

Q. You made an assignment of that ?

A. That is right.

Q. Do you have a copy of that here in Court ?

A. Yes.

Q. Is it a recorded document ?

(Testimony of M. J. Spiesman, Sr.)

A. Yes. It should be, at the courthouse in St. Maries.

Q. You also testified, Mr. Spiesman, that then you wanted to give away an interest that you had in the Spiesman & Spiesman partnership.

A. Yes.

Q. I ask you specifically, how did you make the gift of what interest you had in that partnership?

A. Well, I had a common denominator some way, I had to have a common denominator, of some way to divide it evenly amongst the children, and that seemed a tough thing to do unless I stayed in, so I took the, we took the, or I did, the [46] denomination was 90th, that is, I owned 45/90ths of Spiesman & Spiesman, so I gave 35/90ths to the children and kept 10.

Q. And how was that evidenced, Mr. Spiesman?

A. What?

Q. What did you do, did you draw up any papers on that? Did you make an assignment of an interest?

A. Yes, certainly I did.

Q. What—

A. I gave it to—it's in the evidence there, ain't it, that paper?

Mr. Basye: I ask for Petitioner's Exhibit 10.

A. You asked how I divided it?

Q. With respect to the last question I asked you, is this the way you made the gift to the children of your interest in Spiesman & Spiesman, a partnership, by entering into that partnership agreement

(Testimony of M. J. Spiesman, Sr.)

which is identified in evidence as Petitioner's Exhibit 10?

A. That is right. And to get that 1/9 I had to use 90ths. I put in—

Q. (Interrupting): You have answered the question, Mr. Spiesman. I haven't asked you any more questions yet.

A. Oh. I was going to explain how it come out.

Q. Just one more question, Mr. Spiesman. That was that the article which has been submitted as Petitioner's Exhibit 8, you testified that that was the reason that you [47] decided to form a family partnership with the children. Is that right?

A. I stated that it was the reason. There may be some misconception there, but that was—

Q. Just explain.

A. It was what gave me the idea.

Mr. Basye: No other questions.

Mr. Andersen: No further questions, your Honor.

The Court: I believe you stated that your reason was that you yourself were getting old and you wanted to—

The Witness: Well, that was the reason, but he put it in a different way, and the paper was what gave me the idea.

The Court: Your reason was that you were—

The Witness: That is it.

The Court: You felt you were getting old and you wanted to distribute your property to your children and grandchildren before you died?

(Testimony of M. J. Spiesman, Sr.)

The Witness: And I got the idea from that magazine.

The Court: All right. Anything further?

Mr. Andersen: I have nothing further, your Honor.

The Court: Stand aside, Mr. Spiesman.

(Witness excused.)

The Court: We will have a five-minute recess.

(Short recess.)

The Court: The court will be in session. [48]

Mr. Andersen: We will call Bud Spiesman.

MATHEW J. SPIESMAN, JR.,

was called as a witness on behalf of himself, the petitioner, and, having been fully duly sworn, testified as follows:

The Clerk: Would you state your name, please.

The Witness: Mathew J. Spiesman, Jr.

Direct Examination

By Mr. Andersen:

Q. What is your nickname? A. Bud.

Q. Mathew J. Spiesman, Sr., Heinie, is your father, isn't he? A. That is right.

Q. Are you married? A. Yes.

Q. How many children do you have?

A. Five.

Q. Are they the same children named by your father as his grandchildren?

(Testimony of Mathew J. Spiesman, Jr.)

A. That is right, yes.

Q. Did your father start you out in business?

A. Yes.

Q. When? A. In 1938.

Q. Did your father also finance the Gem State Club? [49] A. Not entirely. About half of it.

Q. Did your father make any gifts of dividend-paying stock to your children? A. Yes.

Mr. Andersen: May we have this document marked, please.

The Clerk: Petitioner's Exhibit No. 11, so marked for identification.

(Petitioner's Exhibit No. 11 was marked for identification.)

Q. (By Mr. Andersen): I hand you Exhibit No. 11 and ask you what that is.

A. This is the guardianship papers on four of the children.

Q. That is a certified copy, is it not, filed with the probate court? A. Yes.

Q. And the children, four children, are whom?

A. Michael Joe and Phillip James, Leonard John and Mathew J.

Mr. Andersen: I ask this be introduced in evidence.

Mr. Basye: It appears from the face of the exhibit, your Honor, that this is a certificate certified by the Probate Judge in Benewah County, so I have no objection.

(Testimony of Mathew J. Spiesman, Jr.)

The Court: Petitioner's Exhibit No. 11 is received in evidence. [50]

(Petitioner's Exhibit No. 11 was received in evidence.)

Q. (By Mr. Andersen): Mr. Spiesman, would you tell the Court the circumstances under which you were appointed guardian of your children?

A. My father had given my children stock in the amount of 1,200 shares of Bunker Hill & Sullivan, and, I think, 500 shares of Sunshine, and the first dividend checks that came through were cashed, I signed them "M. J. Spiesman, Jr., parent," and then it was probably the next—you see, I don't cash these checks every three months, I keep them, sometimes I had them for six months, and then I would cash all of them at once—but the next one that came through from the Bunker Hill & Sullivan Company, they returned the checks as, because of improper endorsement, so I went to the bank and they said, "Well, you should be appointed guardian by the court and that will eliminate this trouble. Otherwise you will never be able to cash these checks. As they are, they were made out in the children's names, the stock certificates."

Mr. Andersen: May we have this marked, please.

The Clerk: Petitioner's Exhibit No. 12, so marked for identification.

(Petitioner's Exhibit No. 12 was marked for identification.)

(Testimony of Mathew J. Spiesman, Jr.)

Q. (By Mr. Andersen): I will hand you Exhibit No. 12 and ask you what [51] that is.

A. This is the guardianship papers on Francis Edward.

Q. Is that a certified copy? A. Yes.

Q. And it was filed with the probate court?

A. Yes, sir.

Mr. Andersen: I would like to introduce this as Petitioner's Exhibit No. 12 in evidence.

The Court: Petitioner's Exhibit No. 12 is received in evidence.

(Petitioner's Exhibit No. 12 was received in evidence.)

Q. (By Mr. Andersen): This one, Mr. Spiesman, is dated April 17 and the other one is dated, the last one, that is, Francis', is dated the 13th day of October, 1953. That is right, isn't it?

A. Yes.

Mr. Andersen: May I speak to counsel for just a moment, your Honor?

The Court: Certainly.

Mr. Andersen: Your Honor, I have the annual inventory and accounting, copies of which have been certified by the Probate Court of Benewah County, and I was wondering if I could offer them as just one exhibit. Or should they go in individually?

The Court: For what years? [52]

Mr. Andersen: They cover from the date of the accounting to—

(Testimony of Mathew J. Spiesman, Jr.)

The Court: You have reference to the guardianship accounting?

Mr. Andersen: Yes.

The Court: And these are certified copies of the accounts filed with the probate court in these two guardianship matters?

Mr. Basye: Actually I believe there are four separate—

The Court: There are five children, there are two separate guardianship papers that he is offering in evidence.

Mr. Andersen: Only four of the children were born by this time.

The Court: Are these papers with reference to the guardianship of the four children?

Mr. Andersen: Everything is filed in this accounting for all five children.

The Court: And picks up at the proper date with the fifth child?

Mr. Andersen: Yes, sir.

The Court: You want to offer those in evidence?

Mr. Andersen: Yes.

Mr. Basye: We might as well make it one exhibit, your Honor. [53]

The Court: How many of them are there?

Mr. Basye: I have no objection to marking them as one exhibit, but I want it understood that there is no certificate from the probate judge saying that all documents have been filed as of the time of the probate proceedings.

The Clerk: I will just take the ones that are clipped together.

(Testimony of Mathew J. Spiesman, Jr.)

Mr. Andersen: There is the year of—you see, I thought it would expedite the—

The Court: Then wait just a moment. Put them in an envelope or staple them together, some way that they will keep together, mark it as one exhibit and offer it in evidence as the one exhibit, the documents relating to the accounts filed by the guardian, the guardianship accounts filed with the probate court, treat it as one exhibit.

The Clerk: This will be Petitioner's Exhibit No. 13, so marked for identification.

(Petitioner's Exhibit No. 13 was marked for identification.)

The Court: Staple them together, please.

Mr. Andersen: Yes, your Honor.

The Court: You can do that during the noon recess.

Are you offering those in evidence now?

Mr. Andersen: Yes, your Honor.

The Court: Any objection? [54]

Mr. Basye: No objection, your Honor.

The Court: Petitioner's Exhibit No. 13 will be received in evidence, consisting of a number of accounts filed by the witness, by the guardian, Mathew J. Spiesman, Jr., with the probate court with respect to his wards, the five children named.

(Petitioner's Exhibit No. 13 was received in evidence.)

Q. (By Mr. Andersen): In the preparation of

(Testimony of Mathew J. Spiesman, Jr.)

the account, did you have any accountant help you in the preparation of these accounts?

A. Kenneth Esmay.

Mr. Andersen: I offer in evidence order settling inventory of account and reported guardian, dated November 12, 1953.

The Court: Have it marked.

Mr. Andersen: For identification.

The Clerk: Petitioner's Exhibit No. 14, so marked for identification.

(Petitioner's Exhibit No. 14 was marked for identification.)

Mr. Andersen: We tried to stipulate this, but could reach no agreement, your Honor.

The Court: Petitioner's Exhibit No. 14 will be received in evidence.

(Petitioner's Exhibit No. 14 was received in evidence.) [55]

Q. (By Mr. Andersen): I hand you Exhibit No. 9 and ask you if you and your father were partners of Spiesman & Spiesman? A. Yes.

Q. And that partnership ended on December 1—or I mean November 30—1951?

A. That is right.

Q. And at that time did your father and you own the equipment equally? A. Yes.

Q. I hand you Petitioner's Exhibit No. 10, which is the partnership agreement of your father and yourself and your children, and ask you if at the

(Testimony of Mathew J. Spiesman, Jr.)

moment before you formed that partnership you and your father owned the equipment equally.

A. Yes.

Q. There has been a correction on there, and I will ask you if you made the correction.

A. I wrote this in on the top line, I didn't know there was a mistake in this document until Mr. Straub came along in this case—

Q. But I mean, is it correct as your father has identified it? A. It was corrected then.

The Court: You have identified this as Petitioner's Exhibit for identification No. what? [56]

Mr. Andersen: No. 10.

Q. (By Mr. Andersen): That is your signature on the lefthand corner? A. Yes.

Q. And you have made the corrections?

A. And that is my father's signature down below—

Q. Your father has testified that that was made after the examination— A. That is right.

Q. Under the terms of this agreement, then, you were to receive one-third, you were to receive a salary of \$250 a month and receive one-third of the profits thereafter and your five minor children—

A. One-ninth.

Q. And your father one-ninth—

Mr. Basye: I will object, your Honor. The document speaks for itself.

The Court: I will overrule the objection. It is in.

Q. (By Mr. Andersen): And in the gifts you received from your father did you receive from him

(Testimony of Mathew J. Spiesman, Jr.)

by any instrument conveyance the interest in the equipment to the children? It was just possession, was it not? In other words, you didn't give him a bill, he didn't give you a bill of sale or anything like that, he just turned over to you the equipment, his interest, and you [57] as guardian accepted it?

A. Yes—you mean on the stocks?

Q. No. I am talking about this partnership now, that Spiesman & Sons—

A. Spiesman & Sons? No, I didn't get, he turned his interest over to the five boys, and he made a gift return on it, I think.

Q. I understand that. But he didn't make a bill of sale or anything like that? A. No.

Q. Was possession of the property conveyed to the children then? A. Yes.

Q. As identified by this instrument, between you two people, you and your father? A. Yes.

Q. How much did your father give each child, can you tell the Court?

A. He owned 50 per cent of the equipment, and he gave them one—he kept one-ninth of, he kept one-ninth of his 50 per cent interest.

Q. One-ninth of the whole interest?

A. One-ninth of the whole, yes. And then he ended up with one-ninth, and I gave the boys all but one-third, I gave them, I kept one-third and gave, and had to divide it into [58] ninetieths to make it come out even.

Q. Then he would have had 45/90ths interest in the equipment, he kept 10/90ths.

(Testimony of Mathew J. Spiesman, Jr.)

A. And gave away seven.

Q. And the five children would have gotten seven-ninetieths apiece? A. Yes.

Q. Then it was your intention to convey to the children all but, that is, it would be 21/90ths, wouldn't it? A. I kept one-third.

Q. No, it would be 15/90ths?

A. I gave away 15/90ths.

Q. And the seven and the three would make a ten, which would be a ninth each, and so when the partnership was formed each one would own one-ninth interest in the equipment?

A. That is right.

Q. And that would be your father, M. J., Sr., and the five children, minor children?

A. And myself.

Q. And yourself would own a third, you and your wife? A. Yes.

Q. Mr. Spiesman, when your father gave you these stock certificates for the children as a gift to the children did you have the stock certificates transferred to their own name? A. Yes. [59]

Q. And they are accounted for reasonably correctly on the accounting made to the court?

A. Yes.

Mr. Basye: I object, your Honor, as to it being reasonably correct. The accountings are in evidence. It would be his opinion as to whether or not they are reasonably correct.

The Court: I will sustain the objection.

We will recess until 2 o'clock.

(Testimony of Mathew J. Spiesman, Jr.)

(Whereupon, at 12:30 o'clock p.m. the hearing was recessed until 2 o'clock p.m. of the same day.) [60]

Afternoon Session, 2 o'Clock P.M.

The Court: The Court will be in session.
I believe Mr. Spiesman, Jr., was on the stand.
Will you resume the stand, Mr. Spiesman.

MATHEW JAMES SPIESMAN, JR.
resumed his testimony as follows:

Direct Examination
(Continuing)

By Mr. Andersen:

Q. I will hand you Exhibit No. 8 and ask you if you have read that article? A. Yes, I have.

Q. I will ask you if you and your father discussed forming the partnership with your children as a result of reading that article.

A. Yes, my father called this to my attention, this article.

Q. Did you do anything else with regard to determining whether the article was—

A. Yes, I did.

Q. (Continuing): —correct or not?

A. Yes, I did. I had quite an argument as to whether a citizen could interpret this article and do what it said and then I went to a lawyer and he

(Testimony of Mathew J. Spiesman, Jr.) said, "I believe you can," but he didn't sound too sure.

Q. What was the lawyer's name? [61]

A. He said he would look it up.

Q. What was the lawyer's name?

A. Warnett & Crowley.

Q. Which one did you talk to?

A. Warnett. So when I went back home my father suggested I go down and see the Internal Revenue Department, so I did, but I was advised there that they didn't give advice, and they gave me a copy of the law on it and told me what to look up.

Q. That is, Section 191 and Section 3797.82.

A. I don't know the numbers, but I looked them up.

Q. Mr. Warnett was a former Supreme Court Justice here in Boise, Idaho?

A. That is the man, yes.

Q. Did he give you any advice?

A. He looked it up in the meantime, and, when I gave him the numbers, and he told me it was all right.

Q. And he advised you that the children could hold property and be a partner?

A. Either by gift or by purchase, yes.

Q. Mr. Spiesman, after you had talked to your attorney and found out that a child could be taken in as a partner you proceeded to form a partnership of Spiesman & Sons, which is the partnership that is now in existence, of Spiesman & Sons, is that correct? [62] A. Yes, that is right.

(Testimony of Mathew J. Spiesman, Jr.)

Q. In forming this partnership, your father gave the children, through you as guardian, 5/90ths interest in the machinery, or in the equipment?

A. He gave 7/90ths. You see, we had to go to a common denominator, and we had to use the 90ths.

Q. And then you accepted the gift, as guardian?

A. Yes.

Q. From your father, for the children?

A. Yes.

Q. And then you also made a gift to the five children, did you not? A. I gave them 15/90ths.

Q. That would be 3/90ths each?

A. That would be, I gave them 15/90ths of my half interest—of the whole, yes.

Q. But I mean, you gave each child 3/90ths interest, that is the way it works out?

A. Yes, 3/90ths to each child, that is the way it works.

Q. So that each child had 10/90ths or one-ninth interest in the partnership? A. Yes.

Q. Your father had one-ninth, and you had a— A. I had 3/9ths. [63]

Q. You had a third?

A. I had 3/9ths or one-third, yes.

Q. During the year of 1951, during which the Sons partnership only operated one month, did you take out a salary? A. Spiesman & Spiesman?

Q. No, Spiesman & Sons, for the one month.

A. Oh.

Q. Did you take a salary?

A. Yes, I believe I did, for the one month.

(Testimony of Mathew J. Spiesman, Jr.)

Q. The record shows that you didn't take anything. A. I am not certain.

The Court: He has to testify, or you must produce your records.

The Witness: I may not. The books of Mr. Esmay will clarify that point.

Q. (By Mr. Andersen): I hand you Exhibit No. 13 and refer to the item of profit and ask you if that is the amount of income each 9th received in 1951 from the partnership of Spiesman & Sons.

A. I believe that is right, I believe that is the right figure.

Q. I will ask you to look there and see whether they withdrew anything in 19—

A. (Interrupting): I don't see any withdrawals there.

Q. Well, there are no withdrawals? [64]

A. In '51.

Q. The amount of income that each one received here shows \$361.59 for each 9th; is that correct?

A. Yes.

Q. I ask you to further look at Exhibit No. 13 and ask you how much profit was shown by each 9th in 1952, for the full year, on the partnership of Spiesman & Sons.

A. Four thousand eight hundred forty-six dollars eighty-five cents.

Q. Mr. Spiesman, on Michael Joseph Spiesman it shows a withdrawal of \$1,593.25. On Phillip James Spiesman it shows—referring to the 1952 year—

A. 1952 income, the whole year?

(Testimony of Mathew J. Spiesman, Jr.)

Q. Yes. It shows a withdrawal of \$15.92 for Phillip James Spiesman—

A. Fifteen hundred ninety-two dollars, you mean.

Q. Fifteen hundred ninety-two dollars.

A. You said fifteen dollars.

Q. Fifteen hundred ninety-two dollars eighty cents. A. Yes.

Q. And Mathew James Spiesman, III, shows withdrawals of \$5,690.16. A. That is right.

Q. Leonard John Spiesman, it shows withdrawals of \$3,848.01. And Francis was fifty-nine hundred— [65]

Mr. Basye: Your Honor, I object to this line of questioning. Is Mr. Andersen testifying here?

The Court: He is referring to the records and reading a figure and asking if that is correct.

Mr. Basye: One other, in the aid of objection, your Honor, is the fact that he is asking about withdrawals from a certain partnership, and apparently the record that he is referring to says that it is a guardianship account, and it seems to me that the best record of these withdrawals by the children is the partnership books and records.

The Court: You may cover that in cross-examination. I will permit the line of questioning at this time.

Q. (By Mr. Andersen): What I would like to have you explain to the Court is why the difference in the withdrawals; they were all equal ownership, but there was a difference in the withdrawals.

(Testimony of Mathew J. Spiesman, Jr.)

A. That is right.

Q. A considerable difference between the two oldest boys and the two youngest boys.

A. That is right.

Q. Would you explain that?

A. Your Honor, the difference in the amount of money withdrawn was due to the fact that Joe, the oldest boy, and Phil, the next oldest boy, had income from dividend stocks prior to the, and more stock, than the other children, and I [66] tried to even up—at that time I tried to even up the cash account of each child, so that if I had an accident, why, or I got killed or died, my youngest child wouldn't say, "Well, my dad wasn't very fond of me; he didn't leave me anything," and I didn't want to have that happen and I wanted them to be even as far as cash was concerned, and then they would eventually receive stock or whatever my dad was going to leave them when he died. But the cash account I tried to even up. It may have been wrong, but at that time I didn't know it.

Q. Did you subsequently make an adjustment, in a subsequent year, on your accounting?

A. I did, on this, in 1954. I think an adjustment is made, I am sure, I know it is, and the money that was withdrawn from, I mean the money that was held out of Joe and Phillip was credited to the three youngest boys, was returned to Joe and Phillip, the oldest boys.

Q. This money was in the bank, or cash on hand,

(Testimony of Mathew J. Spiesman, Jr.)

so that you had no trouble making the change back, of the money that had been expended?

A. Yes; it is in the safe deposit books, records.

Q. Mr. Spiesman, you accounted for all the income, I mean your income tax return showed the same account as was reported in your accounting?

A. Yes.

Q. Now, then, upon the audit of the return, they are [67] proposing to place all the income of the five children, for both years, that is, on to you?

A. They are, yes.

Q. This partnership is still in existence, this Spiesman & Sons? A. Yes; it is.

Q. Did you make any further contributions to the partnership for the children other than the 9th interest in equipment that was given to them? Was there sums put in the partnership as capital account?

A. Yes. We have increased the capital account to invest in phonographs.

Q. How much cash did you increase it by, and when? A. I believe it was \$500 each.

Q. Do you know what year that was?

A. I think that was 1954, I believe.

Q. At the time that the partnership was formed you had put in money for the children, as guardian, and you put in their own money, did you?

A. Yes.

Q. How much was it?

A. I put in \$100 apiece, but Francis didn't have a hundred dollars—

(Testimony of Mathew J. Spiesman, Jr.)

The Court: Mr. Spiesman, let me suggest you throw your chewing gum out. That interferes with your talking and our understanding you. [68]

The Witness: I am sorry, your Honor.

Q. (By Mr. Andersen): One hundred dollars each?

A. One hundred dollars each, and Francis had no income or stock then, at that time, and I put in \$100 for Francis and he subsequently paid me \$100 back.

Q. But all the other came out of their own money? A. Yes.

Q. And you did that as guardian for them?

A. Yes.

Q. Mr. Spiesman, what was the reason that you had to put the additional capital in in 1945?

A. Well, I had more locations for phonographs and these amusement games, and I needed, we needed to cover these locations.

Q. When was it that the coin-operated gaming devices became illegal or when they made them—

A. December 31, 1953.

Q. And then did you need any additional capital for pinball machines or anything like that?

A. Not at that time. Later.

Q. You had sufficient capital to take care of that?

A. A little later on, until a little later on, yes.

Q. So that now your business consists of, chiefly of, phonographs and pinball machines? [69]

(Testimony of Mathew J. Spiesman, Jr.)

A. It's amusement devices, these little pinball, pool tables and shuffleboards and phonographs.

The Court: What they call "jukeboxes"?

The Witness: Yes.

Q. (By Mr. Andersen): Do you know how much you took out in 1952 from Spiesman & Sons as salary? A. I am sure it was \$2,400.

Q. That is what you actually withdrew?

A. Yes.

Q. Then the profits above that, then, were divided equally, according to the capital ownership?

A. That is right.

Q. And you said that the partnership is still in existence? A. Yes.

Q. And I was going to ask you, how tall is your oldest boy now? A. Six foot two.

Q. And he is only 16 years old?

A. Sixteen, yes.

Q. I ask you if he has shown any inclination to be in the business, that is, as a repairman or anything? A. Yes; he has helped me off and on.

Mr. Basye: I object, your Honor, as [70] immaterial.

The Court: I sustain the objection.

Q. (By Mr. Andersen): Mr. Spiesman, how much time did you devote for the one month during which the operation was conducted in 1951 and the 12 months of 1952 in service, in performing your services as manager of the Spiesman & Sons partnership? How many hours per day would be the average?

(Testimony of Mathew J. Spiesman, Jr.)

A. An average would be about 3½ hours a day, 3 or 3½ hours a day.

Q. Could you have hired anyone else to do the work for the same amount of money?

A. I imagine, yes.

The Court: Is that in place of himself that you are speaking of?

Mr. Andersen: Yes.

The Court: All right. If you are through with that testimony, I want to get back to the line of testimony which was objected to and I sustained.

I understood you were talking about, now, your boy, who is now 16 years old, and that he is now showing an inclination to take part in the business.

The Witness: Your Honor, he has been—

The Court (Interrupting): Did any of your previous testimony in that respect have reference to what it was in 1951 and '52? Was he then taking any interest in and doing [71] any work in the way of repair?

The Witness: No; not at that time.

The Court: All right; that is all.

That was the basis of my ruling, because he was talking about something now, whereas the years involved are '51 and '52.

Mr. Andersen: Yes, your Honor.

Q. (By Mr. Andersen): Mr. Spiesman, in your experience with coin-operated amusement and gaming devices, is the income chiefly from the machine, the asset itself, or is it from the services of taking care of the machine? Which is the predominant

(Testimony of Mathew J. Spiesman, Jr.)

part? What I am trying to do is to show the relationship between capital and services, the income from the machines.

A. The machine is the, is a source of income.

Q. It is. And then, of course, you testified that you were well paid for the amount of service that you had given.

Mr. Spiesman, do you have any other—let me ask you this, are you employed by the Gem State Club?

A. Yes.

Q. How much of a salary did you draw there in 1951? A. Six hundred dollars a month.

Q. '51?

A. I believe it was \$600 a month, yes. I could check with Mr. Esmay, but I believe it was.

Q. Your return shows six thousand a year. For '51 [72] I am talking about.

A. That is \$500 a month, then. I am not sure.

Q. How much time, how much of your time in the day did you use as an employee of the Gem State Club, you as manager of that club?

A. I put in probably six hours a day.

Q. In 1952, do you recall how much salary you took out?

A. I think it was \$6,000. I wouldn't say. I am not sure.

Q. Your return shows 75 hundred.

A. That could be.

Q. During 1952, would the time you spent taking care of the business of the club be six hours, as you spent before?

(Testimony of Mathew J. Spiesman, Jr.)

A. About six, about seven hours a day, about six or seven hours a day. I worked for the bartenders on their two weeks' vacation, and when one of them was sick I worked, so I would say seven hours a day would be the average. And I took care of the buying of the stock, whatever it took to run the business.

Q. That is the Gem State Club? A. Yes.

Q. Mr. Spiesman, going back to the gifts made by your father to the children, they were bona fide gifts, and there were no strings on it, absolute ownership has been conveyed to your children? [73]

A. That is right.

Q. Mr. Spiesman, have you had any bookkeeping experience? A. None whatever.

Q. Who does your accounting work for you?

A. Kenneth Esmay.

Q. How often does he take care of your accounts?

A. He comes in about every three months and makes the Social Security returns and all of, catches them all up.

Q. Brings the records up about every three months? A. Yes.

Q. The coin-operated gaming devices are now illegal in the state of Idaho?

A. That is right.

Mr. Andersen: Will you mark this, please?

The Clerk: Petitioner's Exhibit 15, so marked.

Q. (By Mr. Andersen): Mr. Spiesman, I hand

(Testimony of Mathew J. Spiesman, Jr.)

you a letter here, Exhibit No. 15, and ask you what that is, or what the contents of that letter are?

A. Is this a letter that I wrote—

Q. It is a copy of the letter that you wrote.

A. This is a copy of a letter I wrote to Calvin Wright, Collector of Internal Revenue in Boise.

Q. You were, in substance, asking for an examination? [74] A. That is right.

The Court: What is the date of the letter?

Mr. Andersen: April 10, 1953.

A. It's not an examination of my own books, but of the partnership of Spiesman & Resor.

Mr. Andersen: I offer in evidence Petitioner's 15. The original was sent to the Director of Internal Revenue.

Mr. Basye: I object on the grounds of immateriality, and no attempt has been made to introduce the original letter, nobody asked us for it. The immateriality of this being that it goes to the firm of Spiesman & Resor.

The Court: What is the purpose of it? What is the materiality of it?

Mr. Andersen: I was going to bring in evidence that the taxpayer had asked for an examination of one phase, and then it went through quite a little bit on how—

The Court: What difference does that make, how they got started in examining?

Mr. Andersen: It is what happened during the examination, was all, one point I wanted to bring out.

(Testimony of Mathew J. Spiesman, Jr.)

The Court: I will let it in.

Just a moment. There is another objection, which is more substantial, and that is the failure to produce the original document.

Mr. Basye: I won't rely on that, your Honor. My [75] objection is as to materiality.

The Court: I don't think it's well to rely upon the other, but if you insist upon it, I will have to rule.

Mr. Andersen: I will withdraw it, then.

The Court: He is not insisting upon the original. Do you want to stand by your offer or do you want to withdraw it?

Mr. Andersen: I will withdraw it, as long as there is objection to it.

Do you want to scratch it out?

The Court: No. Don't scratch it out. We have numbers here that we are keeping track of.

(Petitioner's Exhibit No. 15 was withdrawn.)

Q. (By Mr. Andersen): Mr. Spiesman, they have added, as addition to the—

The Court: Mr. Andersen, let me suggest to you—and this is in the friendliest way I know how—that when you are asking a question and you are speaking about "the thing" or "it," it doesn't mean very much in this record when you later come to read it. If you have reference to specific parties, why don't you refer to them? Get away from that "they."

Q. (By Mr. Andersen): The Commissioner, in

(Testimony of Mathew J. Spiesman, Jr.)

his deficiency notice, proposes [76] to assess against you a penalty for underestimating, that is, both for the year of 1951 and for the year of 1952. I ask you if you had any knowledge of the law pertaining to the penalty for underestimating?

A. No; I had not.

Q. There was no intent on your part, then, to violate the law or evade taxation? A. No.

Q. Who did you rely on to keep you posted on your tax affairs? A. Mr. Esmay.

Q. Had he ever called your attention to the fact that you were underestimating your tax?

A. No. He hadn't brought it up.

Q. Most of the amount is from the addition to the tax, I mean from the audit, is that right?

A. Yes.

Q. Most of the penalty is as a result of the audit?

A. Yes.

The Court: I understand from both parties that this penalty question depends upon whether or not there is a deficiency found.

Mr. Basye: Yes; except for the amount of the deficiency or the portion of the deficiency that has already been conceded in the issue. [77]

The Court: If there is a deficiency found, then there would be a sufficient amount to impose a penalty?

Mr. Basye: I believe not, as far as the—

The Court: You can brief this and call it to my attention now, but I am trying to get in mind—

(Testimony of Mathew J. Spiesman, Jr.)

Mr. Basye: I believe it would be dependent upon the main issue.

The Court: Mostly dependent upon the main issue?

Mr. Basye: The penalty is mostly dependent upon the main issue, yes. If we had that additional income, the penalty would be applicable just on the amount that has been agreed to so far.

The Court: That is your position, too, Mr. Andersen? I gathered that from your last remark to the witness. Is that substantially correct?

Mr. Andersen: That is right.

The Court: All right. I just want to know what I am confronted with here.

Mr. Andersen: No further questions.

The Court: You may cross-examine, Mr. Basye.

Cross-Examination

By Mr. Basye:

Q. Mr. Spiesman, the accountings that you made with respect to your guardianship of your minor children, that were later submitted to the Probate Court in Benewah County, when [78] did you make those accountings?

A. I made those accountings after the agent came in and told me that there was no, there had been no accountings made. Up to that time I didn't know that we had to make an accounting every year.

Q. In other words, they weren't filed with the court until some time after 1953 or during 1953?

(Testimony of Mathew J. Spiesman, Jr.)

A. They were filed in 1953. My attorney didn't advise me at the time of the guardianship that I had to make an accounting.

Q. Who was your attorney at that time?

A. Buell; Buell is the fellow who drew up the guardianship papers.

Q. Did you ever file any inventory of the assets of any of your wards during the period 1947 to 1953? A. I don't believe I did, no.

Q. Mr. Spiesman, I believe it is Petitioner's Exhibit 9, which is the partnership agreement of Spiesman & Spiesman, the one between you and your father, which lists on it certain equipment which it recites in the instrument as being owned and in your possession. Do you recall what equipment you had owned and in your possession when you formed the partnership with your father?

A. Do you mean the equipment that I had when we formed the first, Spiesman & Spiesman? [79]

Q. Yes, sir.

A. I think there were 12 Club Bell machines.

Q. What is a Club Bell machine?

A. Twelve Club Bell slot machines.

Q. A regular, ordinary Las Vegas-type slot machine? A. They were legal.

Q. You put the money in them and you pulled them?

A. They were legal in the State of Idaho.

The Court: He is not asking you whether they are legal. Don't argue. Just answer the questions.

The Witness: Yes, your Honor.

(Testimony of Mathew J. Spiesman, Jr.)

Q. (By Mr. Basye): Was there any other equipment you owned yourself when you went into the first partnership other than the 12 Club Bell machines, as you recall?

A. There were three phonographs.

Q. Did you also have 18 stand slot machines?

A. Yes.

Q. When did you acquire those slot machines?

A. Purchased them.

Q. What was the date you purchased them?

A. I don't remember. I had some of those a long time.

Q. Would it refresh your—

The Court: Before you get away from it, you call them "Club Bell machines," and you may know what it is, I may [80] also, but this record doesn't.

Mr. Basye: Yes, sir.

The Court: Is that a gambling device, what you call the "Club Bell" machine? And the other type, you called them "stand"?

The Witness: Eighteen stand slot machines.

The Court: Were those gambling devices also?

The Witness: Yes, sir.

The Court: They were coin-operated gambling machines?

The Witness: Yes, sir.

The Court: What we call "one-armed bandits"?

The Witness: Yes.

Q. (By Mr. Basye): In other words, all the equipment you owned at this time were ordinary slot machines, other than the phonographs, were

(Testimony of Mathew J. Spiesman, Jr.)

machines in which you put money, pulled a handle, and you may or may not get money in return?

A. Yes, sir.

Q. You said you acquired these machines some time in the past. Would it refresh your recollection if I showed you your depreciation schedule which you submitted with your income tax return? Would it help you if I showed you that?

A. It may help me, yes. I had them quite awhile.

Q. Would it also help you if I showed you the partnership return of Spiesman & Spiesman, attached to which is a [81] depreciation schedule of the assets owned by Spiesman & Spiesman for the year 1952? Would that refresh your recollection, serve to refresh your recollection, of when you acquired these machines?

A. Yes.

Q. Are they the same machines you had in the first partnership?

A. Yes.

Mr. Anderson: Which return do you have there, Spiesman & Sons or Spiesman & Spiesman?

Mr. Basye: We are referring to Joint Exhibit 6-F, please.

Mr. Andersen: Your Honor, he is going back to prior to 1950, which I have no objection to; he is talking about his individual return, but he is now coming up with a depreciation schedule which starts on December 31.

The Court: He is asking him, showing him a document, which he asked would it refresh his recollection as to when he obtained those machines. Now, it wouldn't make much difference whether it was,

(Testimony of Mathew J. Spiesman, Jr.)

when the document was filed or what year it was filed, if it refreshes his recollection.

Mr. Andersen: He was talking back prior to the Spiesman & Spiesman partnership, as I understood. Perhaps I misunderstood him. And he is bringing in the Spiesman & Sons——

The Court: Do I understand you are making some kind [82] of an objection?

Mr. Andersen: Yes.

The Court: What is it you are objecting to?

Mr. Andersen: I am objecting to him bringing in the depreciation schedule as of December 31, 1951, when he is talking of a time prior to February, 1950. If he will bring his time up, I would have no objection then.

The Court: I will overrule the objection.

Mr. Andersen: Very well.

Q. (By Mr. Basye): Would you look at your orginal of the 1952 Spiesman & Son partnership return?

The Court: Is that in evidence?

Mr. Basye: A photostatic copy of what has been admitted as 6-F.

The Court: You are showing the witness a document of what has already been introduced in evidence as 6-F?

Mr. Basye: Right, your Honor.

Q. (By Mr. Basye): And I ask you to look at the depreciation schedule affixed thereto.

A. This is as of the close of business of 1952.

Q. I didn't ask you that. I just said look at it a

(Testimony of Mathew J. Spiesman, Jr.)

moment. After you look at it, does that refresh your recollection as to when you acquired the slot machines we have been [83] talking about, after you look at that document?

The Court: Off the record for a moment, please.

(Discussion off the record.)

The Court: On the record.

Q. (By Mr. Basye): You have seen the document. Do you recall now when you first acquired the slot machines?

A. I don't remember when I bought them, but I must have had them on hand there.

Q. Well, did you have them on hand prior to 1947?

A. I may have had some of them. They would be pretty old by then.

The Court: Does the exhibit show how many years of depreciation have been taken?

Mr. Basye: Yes; the exhibit shows the dates that he acquired certain ones of the machines.

The Court: Very well.

Q. (By Mr. Basye): These machines you owned, had you operated those machines before you started the partnership, Spiesman and Spiesman, with your father? A. Yes.

Q. You operated those machines as yours, they were your machines? A. Yes. [84]

Q. Your father never passed any money to you to buy those machines?

A. My father advanced me the money when I

(Testimony of Mathew J. Spiesman, Jr.)

opened the Gem State Club, he loaned me the money, or advanced it. I never paid him back.

Q. Was that money used to buy these machines?

A. Yes; that was 1944.

Q. In other words, you bought these slot machines in 1944?

A. I don't say I bought those slot machines. I bought some slot machines in 1944.

Q. Was any of it purchased with your own money?

A. Well, by the time I had the Gem State Club equipped I was a little short.

Q. Mr. Spiesman, let's ask about this Gem State Club. In other words, this is a building, is that right, the Gem State Club is located in a building?

A. It's in a building, yes.

Q. A building owned by the club? A. No.

Q. What is the business of the Gem State Club?

A. The Gem State Club is a corporation.

Q. What is its business? A. It's a bar.

Q. In this club were machines, is that right, slot machines? [85] A. That is right.

Q. And some of these slot machines were your slot machines? A. All of them were.

Q. They didn't belong to the club, they belonged to you? A. That is right.

Q. And you were president of the club, is that right? A. That is right.

Q. Were these machines licensed after the year 1947 in your name?

(Testimony of Mathew J. Spiesman, Jr.)

A. They were always licensed in the name of the Gem State Club.

Q. Were they ever licensed in the name of your father? A. No.

Q. And none of them are licensed in your name, Mr. Spiesman? A. Not that I know of.

Q. They are all licensed in the name of the club?

A. The agreement between me and the Gem State Club, of which you have a copy, agrees that the Gem State Club is to pay for the license.

Q. Now, let's go into that, Mr. Spiesman. I didn't get your last remark about that I had a copy of it.

A. Mr. Straub made a copy of the agreement.

Q. There was an agreement, then, between Gem State [86] Club and yourself? A. Yes.

Q. This was a written agreement?

A. It's in the—I didn't hear your question.

Q. Was that a written agreement?

A. Yes.

Q. And what was the nature of the agreement?

A. The agreement was that I owned the machines, maintained the machines, to maintain the machines, and that I was to receive 20 per cent of the receipts.

Q. You were to receive, whatever the machine had left in it after the payouts, at various times you opened up the machines and made collections out of them, you were to get 20 per cent of it?

A. That is right.

Q. And who was to get the rest of the balance?

(Testimony of Mathew J. Spiesman, Jr.)

A. The rest of it was to go to the Gem State Club.

Q. And this covers the period of time, now, from when, that this agreement was in operation?

A. I didn't hear you.

Q. What period of time was this agreement in effect?

A. This agreement was in effect—I don't remember the exact date. I think—

Q. Was it in effect during 1951 and 1952?

A. Yes. [87]

Q. And the income that is shown on the partnership returns of Spiesman & Sons for the years 1951 and 1952 actually represents receipts that you got from the Gem State Club? A. That is right.

Q. And these receipts were from the operation of the machines, is that right?

A. And some, there was some phonograph income, not very much, though.

Q. I see. You also had phonographs that you were more or less leasing to the club, is that right?

A. No; they were out on location in different places.

Q. But in the club there were just slot machines, is that right?

A. There was a phonograph in there, too, but the slot machines was the main source of income.

Q. At no time during—

The Court: Does that refer to the year 1951? Does that testimony refer to the year 1951?

Mr. Basye: 1951 and 1952, I believe.

(Testimony of Mathew J. Spiesman, Jr.)

The Court: 1952, is that correct?

The Witness: Yes.

Q. (By Mr. Basye): Prior to 1951 and 1952 you also had that agreement in effect, is that right?

A. Yes. [88]

Q. Say, 1950, was that agreement in effect, as far as you know? A. Yes.

Q. And you were receiving this division or 20 per cent from the Gem State Club of what the machines were bringing in? A. Yes.

Q. And that was accounted for in your partnership return of Spiesman & Spiesman for the year 1950? A. Yes.

Q. For that portion of 1950 that you were in operation? A. Yes.

Q. Was the partnership in operation before the year 1950? A. Yes.

Q. How did you account for receipts that you got under that same agreement before that time, say, '49, did you take that up in your income tax return individually?

A. The returns have been filed every year, yes.

Q. But as far as those machines were concerned, you have never had any other partnership that held those machines at all?

A. No; I owned it before this Spiesman & Spiesman.

The Court: You say you owned them. You individually owned them?

The Witness: Individually, that is right. [89]

(Testimony of Mathew J. Spiesman, Jr.)

The Court: That was before Spiesman & Spiesman. When was that partnership formed?

The Witness: In 1950.

The Court: So they were always your machines prior to these partnership formations, the formation of your partnerships?

The Witness: Yes.

The Court: Prior to that your father didn't own any of them?

The Witness: No.

The Court: Go ahead. I will have a question or two on that later, but I don't want to interrupt your examination.

Q. (By Mr. Basye): When you formed or entered into a partnership agreement with your father for the operation of a partnership, Spiesman & Spiesman, were you given any money for the machines that you apparently put into that partnership—did your father put any money in them, in other words?

A. Yes; he put in half of the book value.

Q. What was that money used for, to purchase new machines?

A. To purchase one-half of them.

Q. As far as you know, though, your father never got a license to operate a machine in Idaho? [90]

Mr. Andersen: I object to that testimony. Merely because he is not an interested party.

The Court: He didn't have a license.

Mr. Basye: I will withdraw the question.

Q. (By Mr. Basye): With respect to the equip-

(Testimony of Mathew J. Spiesman, Jr.)

ment we are talking about here, which are slot machines, you told me how you actually accepted the gift of an undivided interest in those machines, you said you accepted the gift of an undivided interest in those machines from your father on behalf of your wards, which were your children. How did you accept it? Did he come to you one day and tell you that he was giving his interest in it to the children? Is that what happened?

A. When we drew up the Spiesman & Sons document.

Q. Partnership? A. Yes.

Q. Although there is nothing in the Spiesman & Sons partnership agreement that talks anything about the children making capital contribution of a hundred dollars for their interest, is there?

A. I believe there is.

Mr. Basye: The instrument speaks for itself. I won't pursue that.

Mr. Andersen: He has already testified to that anyway. [91]

Q. (By Mr. Basye): Mr. Spiesman, you testified that you recall correcting Exhibit 10, which is Petitioner's Exhibit 10, dealing with the partnership agreement of Spiesman & Sons. Do you remember when you corrected that?

A. Is this the—

Mr. Andersen: Your Honor, he testified that it was about, right about the time of the examination.

The Court: This is cross-examination, unless you have an objection.

(Testimony of Mathew J. Spiesman, Jr.)

A. This is the partnership of Spiesman & Sons, this is the document that drew it up?

Q. (By Mr. Basye): That is right.

A. Yes; we corrected that after Straub said I owned the machines alone.

Q. Do you recall what date that might have been?

A. It was 1953, but I don't know what date it was.

Q. Was it about the time you started filing your inventories and accountings with the probate court?

A. No. It was before that.

Q. It was before that? A. Yes.

Q. You testified that you came to Boise after reading the article in the magazine and discussing it with your father [92] for the purpose of establishing a family partnership, and you testified you visited a lawyer's office. Can you tell me his name again? A. Warnett & Crowley.

Q. And you talked with him and he told you it was all right to form a partnership?

A. He told me he would have to look it up and advised me to see the Tax Department.

Q. Do you recall advising him of what the partnership business constituted?

A. Yes. I told him that it was the operation of machines and phonographs.

Q. You also testified, Mr. Spiesman, about the sum that you were drawing out of the partnership of Spiesman & Sons. I ask you, what were your

(Testimony of Mathew J. Spiesman, Jr.)

duties as manager of that partnership for which you were being paid? What were your duties?

A. I was to operate the machines and keep them in repair.

Q. By "operate," you mean just maintain them, see that they weren't broken and got fixed when they needed it, when necessary?

A. That is right.

Q. Did it also involve opening up the machines and taking out the money?

A. Yes, sir, accounting. [93]

Q. Did anyone ever have any access to those machines other than yourself, I mean a key to the machines, to get the money out? A. Yes.

Q. Who did?

A. When I would be out of town I would leave the keys there for my father to take care of.

Q. And anybody in the Gem State Club, who worked for them, other than yourself or your father?

A. They could have used the keys, and I have no doubt some of them did.

Q. What were your duties with respect to the Gem State Club? You testified that you were paid a salary for your services in 1951 and '52.

A. To operate the bar, buy the stock, hire and fire the bartenders and try to keep them steady, keep steady men there.

Q. In other words, you sort of managed the club?

A. Yes.

Q. You were the boss? A. Manager.

(Testimony of Mathew J. Spiesman, Jr.)

Q. You were president of the corporation?

A. Yes.

Q. I have one more question, Mr. Spiesman, and that is getting back to the gift of the partnership interest. How was that partnership interest transferred to you as guardian [94] for the wards?

The Court: Which partnership are you speaking of?

Mr. Basye: Of Spiesman & Sons.

A. Spiesman & Sons? Well, my father gave the children each the amount that he gave them and it was in the agreement that they were to receive the income divided that way, in other words, 1/9th.

Q. (By Mr. Basye): I see. What it was was an assignment of interest of income?

A. It was an assignment of his 50 per cent interest in the machines and phonographs.

Mr. Basye: I have no further questions, your Honor.

The Court: Anything on redirect?

Redirect Examination

By Mr. Andersen:

Q. Mr. Spiesman, Section 1518.25 of the Idaho Code requires the filing of an inventory of the estate. Now, when you, in 1953, made this inventory you did it at the suggestion of the probate judge, did you? A. That is right.

Q. And in compliance with the law?

A. That is right.

(Testimony of Mathew J. Spiesman, Jr.)

Q. In other words, you were doing only what you were bound to do?

A. That is right. [95]

Q. Mr. Spiesman, the counsel for the Commissioner of Internal Revenue brought up licenses. In all the time that you have been in the business of operating and maintaining coin-operated gaming devices, what is the policy that you know of, what is the general policy with regard to the locations of where the machines are placed? If someone owns the machine, what does the location do?

A. The location buys the—

Mr. Basye (Interrupting): That calls for an opinion that I don't think he is qualified to give.

Mr. Andersen: Well, let's let him answer on his own machines, then.

The Court: Are you referring to his own policy, as to where he places the machines?

Mr. Basye: I withdraw the objection, if—

Mr. Andersen: I asked as to a general policy.

The Court: I will sustain the objection, if that is what you are asking.

Q. (By Mr. Andersen): Was it the policy on the machines that you had out, Mr. Spiesman, whether they were phonographs or coin-operated amusement or gaming devices, whether or not the location paid for the federal tax stamps and the state licenses, and were they in their name or was it in the name of the partnership or [96] yourself?

A. It was in the name of the location.

Q. And it always was? A. Yes.

(Testimony of Mathew J. Spiesman, Jr.)

Q. And that is what was usually required, too, wasn't it, by the Internal Revenue office?

A. Yes.

Q. Mr. Spiesman, there was testimony about your agreement when you formed the partnership of Spiesman & Spiesman. There was a new agreement entered into wherein your father and yourself—I will ask you if it was oral—wherein your father and yourself then contracted with the Gem State Club or any other location whereby you furnished the machines for, as in the case of the Gem State Club you took 20 per cent, but others you took 50, and I ask you if that wasn't a new contract between the partnership then, consisting of yourself and your father and the Gem State Club or the new location?

A. We didn't have any agreement with the Gem State Club. We carried on the old one.

Q. Did you assign it, or, in other words, where did your father get the rights?

A. We just signed it over.

Q. When you had the partnership formed of Spiesman & Sons, you from time to time put machines in locations and you also had the Gem State Club. Was this an agreement then [97] between the new partnership and the club?

A. No. We carried it right on through.

Q. But it was an assignment, was it?

A. Yes.

The Court: What do you mean, it was an as-

(Testimony of Mathew J. Spiesman, Jr.)

signment? Was there some written assignment of an agreement?

Mr. Andersen: No; there wasn't, that I know of.

The Court: Then it was just something that was done, is that it?

Mr. Andersen: Yes.

The Court: Is that it?

The Witness: It was agreed upon to continue to carry on the same——

The Court: How do you mean, agreed upon? Did you discuss the matter and say, "This is what we will do"?

The Witness: Yes.

The Court: You and your father?

The Witness: My father and I and the directors of the Gem State Club.

The Court: You say that is a corporation? Who owns the stock of the Gem State Club?

Mr. Anderson: It is a non-profit organization, your Honor. Could I explain one thing to you?

The Court: No. I want testimony here, or testimony of the witness, or documents, not testimony of counsel. If you [98] think it's important, get it in. If you don't, leave it out.

Q. (By Mr. Andersen): Mr. Spiesman, you did not consider that you were the owner of the machines and then therefore owner of the income from the machines entirely after you formed your partnership of Spiesman & Spiesman and then subsequently the partnership of Spiesman & Son?

A. No.

(Testimony of Mathew J. Spiesman, Jr.)

Mr. Andersen: That is all.

The Court: Anything further on cross-examination?

Recross-Examination

By Mr. Basye:

Q. You testified, Mr. Spiesman, that these licenses were issued usually in the name of the Gem State Club. Is that right? Do I understand that to be true? A. That is right.

Q. Who paid the license fees?

A. The Gem State Club.

Q. Did you on the 1952 partnership income tax return, for Spiesman & Sons, take deduction for license fees? Do you recall that you did?

A. I don't recall that, no. I don't believe we did, not on the Gem State Club, no, I don't believe there was any deduction for licenses.

The Court: Were there any other, were there any [99] deductions taken on the income tax returns referred to as to machines, for licenses for machines located any place else than the Gem State Club?

The Witness: No; we had only phonographs out, and there wasn't any in other locations.

Q. (By Mr. Basye): Another question, Mr. Spiesman: You testified on direct examination concerning your opinion as to what produced income from machines, whether it was capital in the form of the machines or whether it was in services, and you gave an answer that it was capital. Is that true?

A. That is right.

(Testimony of Mathew J. Spiesman, Jr.)

Q. Is it also your opinion that it would be very pertinent as to the amount of income you might derive from a machine, depending upon where the location of that machine was? A. Well, yes.

Q. That would be a factor, would it not?

A. That is a factor, yes.

Q. Did you consider that the fact that these machines were in the Gem State Club, that was the best place that you could place them, and you put them there only because you had an agreement between yourself as president of the club and yourself as owner of the machines? A. Yes.

Mr. Basye: No further questions. [100]

Redirect Examination

By Mr. Andersen:

Q. The agreement between the club and yourself was prior to the formation of the partnership?

A. Yes.

Q. Then, the agreements with the club and—and that would be between the partnership of Spiesman & Spiesman, and then when they formed the partnership for Spiesman & Sons, the agreement would be between the club, as to the leasing of the machines, dividing of the profits? A. Yes.

Mr. Andersen: I have nothing further.

The Court: I wish you would clear something up for me, Mr. Spiesman. You have been referring to the ownership of these machines at the time they were put into the partnership of Spiesman & Spies-

(Testimony of Mathew J. Spiesman, Jr.)

man, that is, the partnership between you and your father.

The Witness: Yes.

The Court: And the agreement which has been offered in evidence here as Exhibit 9 states that you then were in possession of and owned those machines, they were wholly yours, your father owned no interest in them at all. Is that correct?

The Witness: That is correct.

The Court: And you put the machines into the partnership? [101]

The Witness: Yes.

The Court: That was your contribution to that partnership?

The Witness: My father gave me 18—

The Court: I asked you, was that your contribution to that partnership?

The Witness: Yes.

The Court: Your father, according to the exhibit, agreed to pay a sum equal to one-half of the value of the assets. They were the assets, is that correct?

The Witness: The machines were the assets.

The Court: And he was to pay one-half as much, now, as your machines and the amount he put in went?

The Witness: He gave me a check for half of the book value of the machines.

The Court: All right.

The Witness: That was half of the assets.

The Court: Then he bought them from you be-

(Testimony of Mathew J. Spiesman, Jr.)
fore they were put in, is that correct? Did you keep
that money yourself?

The Witness: Yes.

The Court: And the money that he paid then
didn't go into the——

The Witness: I put that in my personal ac-
count; [102] that was my money.

The Court: You kept the money?

The Witness: Yes.

The Court: In other words, he bought one-half
of your interest in the machines and then the ma-
chines went into the company?

The Witness: That is right, he bought right in
with me.

The Court: That is the impression I got from
first reading the instrument, it looked thereafter as
if he owned one-third and you owned two-thirds.

The Witness: No.

The Court: That is sufficient on that.

This, I believe, may have been covered, but if it
has it won't do any harm to go over it again. I be-
lieve these accounts that you filed with the probate
court, you filed with them an account of money re-
ceived on behalf of your wards, your children?

The Witness: Yes.

The Court: But you did not file, as I understand
your testimony, any such accounts until the year
1953?

The Witness: That is right. I didn't know I——

The Court: That is, after the agents of the In-

(Testimony of Mathew J. Spiesman, Jr.)

ternal Revenue Service had begun their investigation of your income tax transaction? [103]

The Witness: Then, Your Honor, when I got—

The Court: Is that correct?

The Witness: That is correct. And then I got legal advice.

The Court: All right. Now I am trying to get the time of this. Had you at any time prior to that time filed any fiduciary returns with the Internal Revenue Service or Internal Revenue Bureau, as it may have then been known, as guardian of your five children?

The Witness: No. I had cashed dividend checks and put the money away for them.

The Court: What did you do with the money that you received from these dividend checks? That is on the stock, is that right?

The Witness: That is right. I bought war bonds for the children.

The Court: In their names?

The Witness: Yes.

The Court: You immediately used the income or the dividends received on the—

The Witness: That is right.

The Court: On the mining company stocks?

The Witness: And bought bonds.

The Court: And bought bonds in their names?

The Witness: Yes, sir. [104]

The Court: Their names alone or—

The Witness: Just their names alone.

(Testimony of Mathew J. Spiesman, Jr.)

The Court: You are not put on there as co-owner or beneficiary or anything of the sort?

The Witness: I think we put it on there that I was the parent or guardian, yes.

The Court: Were you?

The Witness: I am not clear on—

The Court: On any of them did you designate yourself or anybody else as co-owner of those bonds?

The Witness: No, those bonds belong to the children.

The Court: Did you put on there anything with respect to who was beneficiary in the case that the child died?

The Witness: Their mother.

The Court: Their mother?

The Witness: Yes.

The Court: I wish you would give me, if you can, the birthdates of your children. We have been referring to their ages as of certain times and if you will give me the birthdates of each of your children, beginning with the oldest, I think we can figure out the ages as of any particular time.

The Witness: Joe was born in 1940.

The Court: Do you remember the month and day? [105]

The Witness: It is hard for me to—his birthday is this month, 16th, I believe. I have forgotten my wife's anniversary—

The Court: That is the one you call Joe. Is that Michael Joe?

(Testimony of Mathew J. Spiesman, Jr.)

The Witness: Michael Joe.

The Court: Go ahead.

The Witness: Phillip James was born—Phillip is 13.

The Court: He is 13 now?

The Witness: Yes. I furnished Mr. Andersen with, I asked my wife this same question and I gave him the correct dates. If I could get them from him I could—

The Court: If you have some notation, it would help.

The Witness: I can't remember them. This is in my writing. She gave it to me.

The Court: That is all right. You go ahead and read the dates.

The Witness: Joe's is October 21, 1940.

The Court: Phillip James?

The Witness: November 29, 1943.

The Court: Leonard John?

The Witness: February 11, 1945.

Mr. Andersen: We now want Mathew J., III.

The Witness: July 3rd, 1946.

The Court: And Francis Edward—is that [106] right?

The Witness: Yes. September 26, 1950.

The Court: All right. That, I think, will be all right. We don't need to get confused on ages now.

Is there anything further that you gentlemen have?

Mr. Andersen: Your Honor, I would like to clear one thing there. You asked the question was

(Testimony of Mathew J. Spiesman, Jr.)

there any fiduciary returns filed. The guardian filed returns any time any one of the children had over the required amount of income, he filed a return for them. For instance, if the child got over \$600 in dividends, why, of course then he filed a return.

The Court: There was an income tax return filed for each of the children?

Mr. Andersen: That is right.

The Court: Is that correct?

The Witness: I don't know what you mean by "fiduciary returns."

The Court: Go ahead.

The Witness: We file tax returns for these children every year, we did even before this partnership began.

Further Recross-Examination

By Mr. Basye:

Q. You mean for the time that the partnership was organized?

A. No, before. These children have filed tax returns ever since their income went over \$600.

The Court: Is there anything further? [107]

(No response.)

The Court: Stand aside.

(Witness excused.)

The Court: Call your next witness.

Mr. Andersen: We will call Mr. Esmay.

KENNETH ESMAY

was called as a witness on behalf of the petitioner and, having been first duly sworn, testified as follows:

The Clerk: State your name, please.

The Witness: My name is Kenneth Esmay.

The Court: The Court will be in recess for a few minutes.

(Short recess.)

The Court: The Court will be in session.

Direct Examination

By Mr. Andersen:

Q. Where do you live?

A. St. Maries, Idaho.

Q. What is your occupation?

A. Accountant.

Q. How long have you been an accountant?

A. Eighteen years.

Q. Did you prepare the income tax returns for Mr. M. J. Spiesman, Jr., for the years of 1951 and '52? A. Yes, I did. [108]

Q. How about the partnership of Spiesman & Spiesman for '51?

A. I prepared those.

Q. And Spiesman & Sons for 1951?

A. I prepared that.

Q. And 1952? A. Yes.

Q. Mr. Esmay, did you advise Mr. Spiesman

(Testimony of Kenneth Esmay.)

with regard to a penalty for underestimating for 1951 or '52?

A. I didn't advise him that at the time he possibly was delinquent. In his operation, it is highly flexible and dividends and other incomes are generally hard to predict. We generally took a chance that the estimate would be high enough to cover and any time it wasn't we were in error.

Q. Did you discuss with him this matter?

A. Mr. Spiesman and I.

Q. Did he know that there was a penalty?

A. He knew there was a penalty, but he never was apprised of the condition that he might be short in his estimate. That would be more my error than anyone else's.

Q. Did you know that he was short?

A. Not at the time, no.

Q. And you hadn't advised him?

A. I didn't advise him, no. [109]

Q. And there was no intention, as far as you, to violate the law or evade taxation?

A. No. It was negligence on my part.

Q. Any time anything has ever been called to your attention have you complied? A. Yes.

Mr. Andersen: That is all.

(Testimony of Kenneth Esmay.)

Cross-Examination

By Mr. Basye:

Q. One question, Mr. Esmay. You stated on direct examination that you had prepared the partnership return for Spiesman & Sons for the year 1952. Do you recall whether you had signed that return as preparing it?

A. I have signed every tax return that has been reported on the Spiesmans.

Q. Except that one?

A. No, I signed that one also, I am sure.

Mr. Basye: The document speaks for itself, your Honor. It is in evidence.

The Court: Is it in evidence?

Mr. Basye: The document is in evidence, your Honor.

The Witness: Is it implied that the '52 return wasn't signed by me?

Mr. Basye: The '52 partnership return, [110] yes.

The Witness: It hasn't been signed by me?

Mr. Basye: I would like to make reference to the—

The Court: Do you want to look at the document?

The Witness: I don't know why I didn't sign it. I signed it all the years previous and all since. That may have been an error on my part that it wasn't signed, because I know that I signed it before and since, I didn't realize that one had been omitted. That is my error also.

(Testimony of Kenneth Esmay.)

The Court: Do you want to examine it?

The Witness: No. I will take his word for it.

Q. (By Mr. Basye): As the accountant for Mr. M. J. Spiesman, Jr., during the years of 1951 and '2, do you have any personal knowledge that you can give to the Court as to what Mr. Spiesman might have done with any withdrawals that were credited on the books and accounts of Spiesman & Sons partnership to the withdrawal accounts of these children? Do you know of your own knowledge?

A. You will find that every withdrawal that was ever made from the Spiesman & Sons partnership relative to the money drawn from those accounts that would correctly be stated as belonging to the children, that that money went to three places, we might say. It either went to the Farmers & Merchants Bank at Rockford, Washington, it went to pay on a Sun Life Insurance policy—I take it back, there would be four—[111] it also went to pay their own income taxes, state and federal, and also occasionally a security was purchased for them in the stock exchange through a Merrill, Lynch, Pierce, Fenner & Beane account.

Q. Mr. Esmay, do you know this of your own personal knowledge? Did you draw checks or see checks drawn by Spiesman & Sons partnership payable to the children's account at the bank or what?

A. If money was drawn from the partnership

(Testimony of Kenneth Esmay.)

fund, the partnership's bank account, it was drawn by check.

Q. It was drawn by check?

A. Yes. If money was taken from their personal bank account at the Rockford bank, it was drawn by cash.

Q. I didn't have any question about that.

A. Yes, sir.

Q. I had question about how the money came out of Spiesman & Sons partners.

A. Yes, sir. It was always drawn by check.

Q. But you don't know anything about what deposits Mr. Spiesman might have made, yourself, you of your own personal knowledge?

A. Yes, I do. Everything deposited, every deposit that was ever made, is fully accounted for on the passbooks of the bank at Rockford.

The Court: Were those individual accounts of each [112] child?

The Witness: Yes, each child has his own passbook.

The Court: In other words, when the money was withdrawn from Spiesman & Sons—

The Witness: Yes.

The Court (Continuing): —that was done by check?

The Witness: It was done by check.

The Court: And that check, you say, was deposited to the individual account of the child?

The Witness: Of the child. They deposited the check drawn from the Spiesman & Son partner-

(Testimony of Kenneth Esmay.)

ship. That check may be followed through and shown as a deposit to the individual's account at the bank at Rockford, and it will be recorded in the passbook.

The Court: Did you keep a set of books for Spiesman & Sons?

The Witness: Yes, I did.

The Court: You kept those books yourself?

The Witness: I kept a journal.

The Court: How often did you work on those?

The Witness: I worked on it periodically, say, sometimes by the month, sometimes quarterly. I prepared all papers necessary for payroll recordings and also prepared all closings for income tax reporting and also the inventories for the probate court, the annual account of inventory. I have [113] prepared all of those reports.

The Court: From what had you prepared those?

The Witness: From this journal that I kept.

The Court: I understood that you were not in daily contact with them, then?

The Witness: Well——

The Court: With their daily books kept or anything to show what income was being received and what was being disbursed and all that?

The Witness: Your Honor, I would take the bank statement by the month from the Spiesman & Sons activity, and from that I would report all deposits to that account, all withdrawals from that account, business expense and personal withdrawals for the members of the partnership.

(Testimony of Kenneth Esmay.)

The Court: What kind of books did the partnership itself keep? That is what I am interested in.

The Witness: The partnership itself had a set of books like this. Once a week the partnership received its income from the coin-operated machines, and that deposit was made regularly to the bank account at which the Spiesman & Sons banking was done.

The Court: And who did that?

The Witness: Who made the deposits?

The Court: Yes.

The Witness: Mr. Spiesman, Bud, Junior, he made [114] those deposits.

The Court: What you did, then, was to take the bank books—

The Witness: Yes.

The Court (Continuing): —afterwards and make allocations?

The Witness: I would take the deposit tickets and reconcile it with the bank statement and post my journal from that.

The Court: You say you are an accountant. Are you a certified public accountant?

The Witness: No, I am not. I studied for certified public accountant, but I never did take the examination.

The Court: Anything further?

Q. (By Mr. Basye): You stated that you had done work on the inventory and the accountings, annual accountings, that were subsequently filed by Mr.

(Testimony of Kenneth Esmay.)

Spiesman in the guardianships? A. Yes.

Q. When do you recall that you did that work?

A. I did that work in 1953.

Q. You were never asked by Mr. Spiesman to do anything along that line prior to that time?

A. We were not advised that we had to do that, no.

Mr. Basye: That is all the questions I have. [115]

The Court: I want to ask one more question on this penalty situation.

When you were drawing up or preparing the declarations of estimated income—you prepared those also?

The Witness: Yes.

The Court: I understood you to say that you discussed with Mr. Spiesman, Jr.—

The Witness: Yes.

The Court (Continuing): —what amount should be stated as estimated income?

The Witness: Yes.

The Court: Did you at that time advise him of anything with regard to there being a penalty for underestimation?

The Witness: Yes, he understood that there would be.

The Court: Were these estimated tax returns always filed, the single return, or did you have the subsequent returns that might be filed in June or September, at later dates?

The Witness: Well, these individual returns—

(Testimony of Kenneth Esmay.)

you are referring to the ones for the boys now, or just the personal returns?

The Court: Referring to his own personal returns. This petition in this case is in the case of Mathew J. Spiesman, Jr., and his wife.

The Witness: I had the access, of course, to all [116] records and it was up to my advice what would be the best thing to do, and income was highly flexible in his type of business, we never knew to the full quarter sometimes how good a dividend was going to be in the stock market. Mr. Spiesman has quite a vast holding in the stock market due to his Merrill, Lynch, Pierce, Fenner & Beane account, and also we never knew how good an income we were going to have, take the third quarter, of October, November, December, that was quite lucrative months in the business he was in.

The Court: Did you ever undertake to file a corrected return on or before January 15?

The Witness: Yes. I had filed amended returns, what we called the amendment to an estimate.

The Court: That is right.

The Witness: We had filed those, and then still would miss.

The Court: What about the years '51 and '52? Were they filed then?

The Witness: I would have to go take a look to see.

The Court: Are they in evidence?

(Testimony of Kenneth Esmay.)

Mr. Basye: They might be attached to the returns themselves.

The Court: Either they are or they are not in evidence, and if there were any amended estimates filed they are part of the exhibits that have already been put in evidence, [117] is that right?

Mr. Andersen: I would have to look, your Honor. I would like to look at Exhibits 1 and 2, I believe.

Mr. Basye: Exhibits 1-A and 2-B. They are attached to the original, at least, your Honor.

The Court: Are you talking for the record or just conferring together?

Mr. Basye: Off the record.

Your Honor, I do have in my possession what purports to be the original income tax return from which the photostatic copies which have been submitted in evidence were prepared, and for the year 1951, attached thereto, shows that on March 15, 1951—this is all off the record—

The Court: It's not off the record, it's on the record. You are addressing me now.

Mr. Basye: I am sorry, your Honor. I have in my possession such a document which shows received in the District of Idaho, March 15, 1951, was a declaration of estimated tax form, 1040-ES, of Mathew and Mary Spiesman, whereby the 1950 income tax was shown and an estimated tax for 1951 was shown, the estimated tax for the year 1951 was in the amount of four thousand dollars,

(Testimony of Kenneth Esmay.)

amount paid with the original estimate was one thousand dollars.

Subsequently, on January 15, 1952, there was received in the office of the Collector of Internal Revenue, District [118] of Idaho, an amended declaration of estimated tax for Mathew and Mary Spiesman, showing an estimated income tax for the year 1951 in the amount of \$9,500, of which the amount of \$6,500 was still owing. Apparently they submitted that at the time they filed their estimated return, on the original return, which is in evidence as Exhibit 1-A. It shows they took credit for having paid on declarations of estimated tax for 1951, the amount of \$9,500.

The Court: And would that be the situation that would apply with respect to '52, would there be amendments there?

Mr. Basye: The same situation would hold true in '52, they did file amended returns, an original and amended declaration of estimated tax, and on their final return, which is in evidence as Exhibit 2-B, they claim \$6,500 as having been paid by declaration of estimated tax for the year.

The Court: All right. It may not be too important, in view of the fact that perhaps this whole question of penalty may depend upon whether or not a deficiency is determined.

Mr. Basye: I still think that is the case, although we have run into certain amounts.

The Court: All right, if we run into something different, we have the record for it.

Is there anything further?

Mr. Basye: I have no further cross-examination of [119] the witness.

The Court: All right, you may stand aside, Mr. Esmay.

(Witness excused.)

Mr. Andersen: That is all I have, Your Honor.

The Court: Petitioner rests?

Mr. Andersen: Yes.

The Court: Respondent?

Mr. Basye: Will you mark for identification Respondent's Exhibit H.

The Clerk: Respondent's Exhibit H, so marked.

(Respondent's Exhibit H was marked for identification.)

Mr. Basye: This purports to be, on its face, a certificate, with the seal of the Judge and the ex officio Clerk of the Probate Court of Benewah County, which purports to be a complete record of all documents and orders issued in the Probate proceedings involving the guardianship of Michael Joseph Spiesman; Leonard John Spiesman; Mathew J. Spiesman, III; and Phillip James Spiesman up to the time of October 23, 1953. I offer it in evidence, Your Honor.

The Court: Respondent's Exhibit H is received in evidence.

(Respondent's Exhibit H was received in evidence.)

Mr. Andersen: The probate records only bring

in four of the boys. The fifth one isn't in there. I was wondering—— [120]

Mr. Basye: The reason it isn't there is because there have been no probate proceedings with respect to the time that that record speaks, which is in November of 1953. He hadn't been appointed a guardian of that child at that time.

Mr. Andersen: On what date?

Mr. Basye: I will have to look at the date of the certificate again.

Mr. Andersen: On November, and he was appointed on October 13.

Mr. Basye: Let me look at the record, counsel. It speaks as of October 23, 1953.

Mr. Andersen: The record will show, the exhibit will show, that Mr. Spiesman was appointed guardian of Francis Edward Spiesman on October 13, 1953.

The Court: Well, how does that help us? We have this record in evidence. If there are others that you want, it is up to you to get them.

Go ahead.

Mr. Basye: I will call Mr. Flower.

CLAUDE F. FLOWER

was called as a witness on behalf of the Respondent and, having been first duly sworn, testified as follows:

The Clerk: State your name, please.

The Witness: Claude F. Flower. [121]

(Testimony of Claude F. Flower.)

Direct Examination

By Mr. Basye:

Q. Would you give the Court your home address, Mr. Flower.

A. Rockford, Washington.

Q. What is your occupation, Mr. Flower?

A. Banking.

Q. In that connection, what concern are you now with?

A. Farmers & Merchants Bank of Rockford.

Q. What is your position with that firm?

A. Cashier.

Mr. Basye: Will you mark for identification Respondent's Exhibit I, please.

The Clerk: Respondent's Exhibit I, so marked for identification.

(Respondent's Exhibit I was marked for identification.)

Q. (By Mr. Basye): I hand you Respondent's Exhibit I for identification—

Mr. Andersen: May I see it, please.

Mr. Basye: I would like to have it identified first, please.

Q. (By Mr. Basye): And I ask you if that is an original ledger sheet from the Farmers & Merchants Bank of Rockford, Washington. [122]

A. That is right.

Q. Have you had custody of that original ledger

(Testimony of Claude F. Flower.)

sheet since it left the bank in Rockford, Washington? A. I have.

Q. The original ledger sheet is with respect to what particular bank account at the Farmers & Merchants Bank in Rockford?

A. Spiesman & Sons of St. Maries.

The Court: You will be getting an opportunity to cross-examine. If you want to study it, of course that is another thing. We cannot take time out now to study it.

Mr. Basye: I offer Respondent's Exhibit I in evidence, Your Honor.

The Court: Respondent's Exhibit I is received in evidence.

(Respondent's Exhibit I was received in evidence.)

Mr. Basye: Would you mark for identification Respondent's Exhibit J.

The Clerk: Respondent's Exhibit J, so marked.

Mr. Basye: As I offer these in evidence, I would like at the same time to make a motion to withdraw them and substitute photostatic copies.

The Court: Would you so state at the time you are offering them, so we will know which ones you want to withdraw.

The Clerk: Respondent's Exhibit J, so marked for [123] identification.

(Respondent's Exhibit J was marked for identification.)

(Testimony of Claude F. Flower.)

Q. (By Mr. Basye): I hand you Respondent's Exhibit J for identification and ask you if that likewise is an original ledger sheet from the Farmers & Merchants Bank of Rockford. A. It is.

Q. That you have had in your possession since it left the bank? A. Yes.

Q. Is it an original record of the bank?

A. It is.

Q. What does it purport to be?

A. The savings account of Phillip James Spiesman of St. Maries, Idaho.

The Court: Do you have photostats of these?

Mr. Basye: I do not.

The Court: Now?

Mr. Basye: That is why I asked to withdraw them and have them made.

Mr. Andersen: May I ask a question before they are introduced?

The Court: No. He has to offer them, and then if you want an objection or something of the sort, why, we will consider it. [124]

Mr. Basye: I offer in evidence, Your Honor, Respondent's Exhibit J.

Mr. Andersen: I don't want to raise an objection, but I want to ask a question.

The Court: Has it to do with the identification?

Mr. Andersen: Very much so, Your Honor.

The Court: Very well.

Q. (By Mr. Andersen): Did you bring the de-

(Testimony of Claude F. Flower.)

posit slips here, showing the deposits, what they came from, whether they were Hecla or Bunker Hill & Sullivan, whether they were interest or Hecla dividends, or anything? A. No, I didn't.

Mr. Basye: How would he know that, from the bank?

The Court: Don't get into argument here.

Did you have an objection?

Mr. Andersen: I have an objection to the introduction of that exhibit.

The Court: I overrule the objection.

Mr. Basye: Would you mark for identification Respondent's Exhibit K, please?

The Clerk: Respondent's Exhibit K, so marked for identification.

(Respondent's Exhibit K was marked for identification.) [125]

Q. (By Mr. Basye): I hand you Respondent's Exhibit K and ask you if you can identify that as an original ledger sheet kept in the ordinary course of business by the Farmers & Merchants Bank of Rockford, Washington. A. Yes, I can.

Q. It has been in your possession since it left the bank? A. That is right.

Q. What does it purport to be?

A. This is a record of the savings account of Michael Joe Spiesman of St. Maries, Idaho.

Mr. Andersen: Same exception.

Mr. Basye: I haven't offered it yet, Mr. Andersen.

(Testimony of Claude F. Flower.)

I offer in evidence Respondent's Exhibit K.

The Court: You make the same objection?

Mr. Andersen: Same objection.

The Court: The objection will be overruled, the objection to Respondent's Exhibit K will be overruled, and I don't think I received J, but I will now; both J and K are received in evidence.

(Respondent's Exhibits J and K were received in evidence.)

Mr. Basye: Would you mark for identification Respondent's Exhibit L, please.

(Respondent's Exhibit L was marked for identification.) [126]

The Clerk: Respondent's Exhibit L, so marked for identification.

Q. (By Mr. Basye): I hand you Respondent's Exhibit L for identification and ask you if you can identify that as an original ledger sheet from the Farmers & Merchants Bank of Rockford, Washington.

A. I can.

Q. Has that been in your possession since it left the bank? A. Yes, it has.

Q. What does it purport to be?

A. A record of the savings account of Mathew J. Spiesman, III, St. Maries, Idaho.

Mr. Basye: I offer in evidence, Your Honor, Respondent's Exhibit L.

Mr. Andersen: Same objection.

The Court: The objection will be overruled and Respondent's Exhibit L will be received.

(Testimony of Claude F. Flower.)

(Respondent's Exhibit L was received in evidence.)

Mr. Basye: Will you mark this.

The Clerk: Respondent's Exhibit M, so marked.

(Respondent's Exhibit M was marked for identification.) [127]

Q. (By Mr. Basye): I hand you Respondent's Exhibit M for identification and ask you if you can identify that as one of the original ledger sheets from the Farmers & Merchants Bank of Rockford, Washington. A. I can.

Q. And have you been in possession of that since it left the bank? A. Yes.

Q. What does it purport to be?

A. A record of the savings account of Leonard John Spiesman, St. Maries, Idaho.

Mr. Basye: I offer, Your Honor, Respondent's Exhibit M.

The Court: Respondent's Exhibit M is received in evidence, overruling—it may be understood you are making the same objection, and it is overruled.

(Respondent's Exhibit M was received in evidence.)

Mr. Basye: Mark this, please.

The Clerk: Respondent's Exhibit N, so marked for identification.

(Respondent's Exhibit N was marked for identification.)

(Testimony of Claude F. Flower.)

Q. (By Mr. Basye): I hand you Respondent's Exhibit N for identification and ask you if you can identify that as being an original ledger sheet from the Farmers & Merchants Bank of [128] Rockford, Washington. A. I can.

Q. And that, again, has been in your possession since it left the bank? A. It has.

The Court: For whose account is that ledger sheet?

Q. (By Mr. Basye): Could you tell us whose savings account that purports to be a record of?

A. Yes. It's the savings account of Francis E. Spiesman, St. Maries, Idaho.

Mr. Basye: I offer Respondent's Exhibit N, Your Honor.

The Court: Subject to the same objection of the petitioner, which is overruled, Respondent's Exhibit N is received in evidence.

(Respondent's Exhibit N was received in evidence.)

Mr. Basye: At this time I would like leave to move to substitute, to withdraw the exhibits and substitute photostatic copies thereof.

The Court: That has reference to these bank records?

Mr. Basye: To the bank records, which are exhibits I thru M, inclusive.

The Court: Leave is granted to the respondent to withdraw the originals of Respondent's Exhibits I, J, K, L, M, and N and substitute photostatic copies therefor. [129]

(Testimony of Claude F. Flower.)

Q. (By Mr. Basye): Mr. Flower, I hand you Exhibits J, K, L, M, and N, which are all the savings accounts records of the five children, and ask you if you can tell me when each account was first opened.

A. Phillip James Spiesman's account was opened March 17, 1952.

Michael Joe Spiesman's account was opened March 17, 1952.

Francis E. Spiesman's account was opened March 17, 1952.

Mathew J. Spiesman, III's, account was opened March 17, 1952.

And Leonard John Spiesman's account was opened March 17, 1952.

Mr. Basye: I have no further questions, Your Honor.

The Court: Cross-examine, please.

Cross-Examination

By Mr. Andersen:

Q. Mr. Flower, there is shown that on December 31, 1952, in the Michael Joseph Spiesman account there was the amount of \$4,874.83.

A. You wanted the balance as of that date?

Q. That is right.

A. \$4,874.83, yes, sir. [130]

Q. I hand you Respondent's Exhibit M and ask you if the balance in the Rockford Bank is the balance that is shown here, in the accounting of Mr. Leonard John Spiesman, of \$4,673.93.

(Testimony of Claude F. Flower.)

A. What date was that?

Q. December 31, 1952.

A. That is correct.

Q. I hand you Respondent's Exhibit J and ask you if on December 31, 1952, the balance in the Rockford bank of Phillip James Spiesman is \$3,653.21. A. That is right.

Q. I hand you Respondent's Exhibit L and ask you if on December 31, 1952, Mathew James Spiesman, III's, account in the Rockford bank was \$4,664.01. A. That is right.

Mr. Andersen: And there is not a certified copy of Francis Spiesman because in '52 Mr. Mathew Spiesman, Jr., hadn't been appointed guardian yet.

Q. (By Mr. Andersen): May I ask you how much was in the bank on December 31, 1956?

A. \$4,663.02.

Q. \$4,663.02? A. That is right.

Mr. Andersen: That is all, Your Honor. [131]

The Court: Is there anything further?

Mr. Basye: I have one question, Mr. Flower.

Redirect Examination

By Mr. Basye:

Q. Do you know, on these savings accounts which have been introduced in evidence, who had the right to withdraw money from the account?

A. So far as I know, M. J. Spiesman, Jr., had that authority.

(Testimony of Claude F. Flower.)

Q. Do you have the signature cards for those accounts?

A. I believe I have those with me.

Q. Could they refresh your recollection if you looked at them, or can you testify of your own independent knowledge that he was the one who could draw money out of those accounts?

A. He was authorized, but whether he was the only one I couldn't say right now.

Q. Could you answer the question if you refreshed your recollection from the signature cards?

A. I think I could.

Q. Do you have such signature cards in your possession? A. Yes, I do.

Q. Would you look at them?

A. I don't have them right here. I have them in my briefcase.

Q. After having refreshed your recollection, can you [132] answer the question whether or not there was anyone other than Mr. Spiesman who had the right to withdraw from those savings accounts?

A. As far as I know, there was not—I was wrong. These apply only to the checking account, only.

Q. They have nothing to do with the signature on the savings accounts that we have asked for, is that right? A. That is correct, yes, sir.

The Court: Do the ledger sheets show, themselves, can you look at those and tell?

The Witness: Those have the names on them only.

(Testimony of Claude F. Flower.)

Mr. Basye: If there is no such evidence in the courtroom, I have no further questions.

The Court: Anything further?

Let me see those ledger sheets, please.

Mr. Andersen: We have no further questions.

The Court: If that is all, you may be excused, sir.

(Witness excused.)

Mr. Basye: Respondent rests, Your Honor.

The Court: Anything further from the petitioner?

Mr. Andersen: I would just like to look one moment to see if I have something to present here.

The Court: We will take a five-minute recess while you examine your notes.

(Short recess.) [133]

The Court: The court will be in session.

Mr. Andersen: May I ask Mr. Flower one more question?

The Court: Do you want to ask him on cross-examination?

Mr. Andersen: I think this will be direct.

The Court: All right.

Will you resume the stand, Mr. Flower.

CLAUDE F. FLOWER

having been previously sworn, was called as a witness on behalf of the petitioner and testified as follows:

Direct Examination

By Mr. Andersen:

Q. I hand you Respondent's Exhibit J and ask you to refer to the first deposit, and I ask you how much that is.

A. The first deposit was for \$1,240.

Mr. Andersen: I offer this as Petitioner's Exhibit 16.

The Clerk: Petitioner's Exhibit No. 16, so marked for identification.

Q. (By Mr. Andersen): I hand you Petitioner's Exhibit No. 16 and ask you what that is.

A. That is a copy of the original deposit slip for Phillip James Spiesman, as of March 17, 1952, totaling \$1,240.

Q. How many items are on there? [134]

A. Five items.

Q. Can you tell me from your records which you brought with you whether or not any of those are dividend checks or not?

A. I might have had one record that would show that.

Q. You didn't bring it along, though?

A. I might have one with me that would show that.

Mr. Andersen: I offer this.

Mr. Basye: I object for the reason it hasn't

(Testimony of Claude F. Flower.)

been purported to be identified. I didn't understand this witness identified that as anything but a copy of a deposit slip.

The Court: Can't you bring out any further identification of it?

Q. (By Mr. Andersen): Is this part of the records that were submitted to Mr. Spiesman as a part of the records for the boy?

The Court: Submitted to Mr. Spiesman?

Mr. Andersen: Submitted by Mr. Spiesman.

A. I didn't get that question quite straight.

Q. (By Mr. Andersen): Is that an official deposit slip?

A. It is not, no. It is a copy of the original.

Q. Who made that up?

A. Our assistant cashier. [135]

Q. And handed to Mr. Spiesman?

A. That is correct.

The Court: Is it a certified copy, certified by the assistant cashier or someone?

Mr. Andersen: It ties in with the very first deposit.

The Court: I understand that, but we are trying to get the identification of it down.

Mr. Andersen: It's a copy.

The Court: Let me ask the witness a question.

How do you know that? From what are you drawing the conclusion for the testimony, the statement, that this is a copy of an original deposit slip? The original deposit slip, I take it, is in your bank?

The Witness: That is correct.

(Testimony of Claude F. Flower.)

The Court: How do you know this to be a copy of that original?

The Witness: At Mr. Spiesman's request for this information, we got out the originals and copied them off.

The Court: Did you copy them off yourself?

The Witness: No, I didn't.

The Court: I understood you to say this was a copy made by somebody else. How do you know that?

The Witness: It was in my presence.

The Court: How do you know that this one is identical [136] to the original? Couldn't somebody have made another and substituted it in its place?

The Witness: Well it's—

The Court: Now, are you positive this is the copy of the original made in your presence?

The Witness: I couldn't swear that it was, since it isn't signed or anything.

The Court: I take it all that you are really testifying to at this time is that Mr. Spiesman requested a copy of a deposit slip, and a copy of the deposit slip was made in your presence?

The Witness: That is correct.

The Court: Now, whether or not this is the copy that was made in your presence, can you testify to that?

The Witness: I am reasonably sure that it is, yes.

The Court: Why do you say "reasonably sure"?

(Testimony of Claude F. Flower.)

The Witness: Well, I think this is the handwriting of our assistant cashier.

The Court: That is in the handwriting—it is not all typed, part of it is in ink, is it?

The Witness: It is all in longhand except the stamp signifying it is a duplicate deposit slip.

The Court: I am not sure whether you said "I think this is" or not. We have to have testimony here and not guess work. Can you testify now as to whether or not that is the [137] handwriting of the assistant cashier?

The Witness: Well, I would say it is, yes.

The Court: Of the cashier who made the copy in your presence?

The Witness: Of the assistant cashier, that is correct.

The Court: Do you want to ask any further questions? I am going to overrule the objection and receive it in evidence.

Mr. Basye: No, Your Honor, I won't ask any questions, nor do I have any objection. If the others are the same, I would stipulate to those, then.

The Court: Have you numbered them?

Mr. Andersen: I have, 1, 2, 3, 4, and a letter, Your Honor.

The Court: Then mark them all, and they will all be admitted at one time.

The Clerk: These are all to be admitted?

The Court: They will. Petitioner's Exhibit 16 is received in evidence. Mark all of them at one time and let's get it over with.

(Testimony of Claude F. Flower.)

The Clerk: Petitioner's Exhibit No. 17, so marked for identification.

The Court: Mark them all at once. Mark the rest of them. There is no need of stringing this thing out.

The Clerk: Petitioner's Exhibit No. 18, so [138] marked.

The Clerk: Petitioner's Exhibit No. 18, so marked for identification.

Mr. Anderson: There will be five altogether.

The Clerk: Petitioner's Exhibit No. 19, so marked for identification.

Petitioner's Exhibit No. 20, so marked for identification.

(Petitioner's Exhibits 16, 17, 18, 19 and 20 were marked for identification.)

The Court: Now hand them all to the witness, all of them at one time.

Mr. Witness, will you look at those exhibits which are marked as Respondent's Exhibits 17, 18, 19 and 20 for identification and state whether or not they are similar records to that, to Petitioner's Exhibit 16.

The Witness: They are.

The Court: You identify them in a similar manner?

The Witness: I do.

The Court: Is there anything else you want?

Mr. Andersen: I offer these in evidence, your Honor.

(Testimony of Claude F. Flower.)

The Court: Petitioner's Exhibits 17, 18, 19 and 20 are received in evidence.

(Petitioner's Exhibits 16, 17, 18, 19 and 20 were received in evidence.)

Q. (By Mr. Andersen): [139] I hand you Petitioner's Exhibit 17, a deposit slip to the account of Francis Spiesman, showing two items totaling \$850, and ask you if that is the first deposit.

A. That is.

Q. One item of \$800 and one of \$50?

A. That is correct.

Q. I hand you Petitioner's Exhibit No. 18, a deposit slip to the account of Michael Joe Spiesman, showing a deposit of \$1,240, showing five items. Would you tell me if that is the first deposit of his.

A. That is right, it is.

Q. I hand you Petitioner's Exhibit No. 18, totaling \$970, having four items, for Mathew J. Spiesman III. Would you tell us if that is the same as the deposit. A. It is.

Q. I hand you Exhibit No. 20, for Leonard John Spiesman, showing \$1,280 deposit, containing five items. Would you tell me if that coincides with your records. A. That is correct.

Q. I hand you for identification Exhibit No. 21, bearing your signature. But I don't see any date on there. Would you tell me about when that was written.

A. This was written on Saturday, last Saturday.

Q. Do you know what date that would be?

(Testimony of Claude F. Flower.)

A. The 6th, wouldn't it? [140]

The Court: October 6, if today is the 8th.

The Witness: October 6th, yes.

Q. (By Mr. Andersen): Would you state what that is?

A. This is a record of certain checks that were cleared through the Farmers-Merchants Bank.

Mr. Andersen: I will offer this into evidence.

Mr. Basye: I suggest you ask the witness whether it is his signature or not. I assume it is his name on it.

The Court: Let me see it.

I don't know exactly what you would call it. It is a statement purporting to set forth a record of checks cleared through the Farmers & Merchants bank?

The Witness: On March 17.

The Court: Of what account?

The Witness: Various accounts, the Spiesman accounts.

The Court: Well, you have offered it.

Q. (By Mr. Andersen): That is your signature? A. That is my signature, yes.

The Court: It is received in evidence as Petitioner's Exhibit No. 21.

(Petitioner's Exhibit No. 21 was marked for identification and received in evidence.)

Mr. Andersen: That is all, your Honor.

Mr. Basye: I have no further questions. [141]

(Witness excused.)

The Court: Anything further to be offered by either party?

Mr. Basye: Respondent rests.

The Court: Is there anything further from the petitioner?

Mr. Andersen: Just one moment, your Honor. We don't seem to be able to find the other document, so we will rest.

The Court: If it is going to affect your case, we will take time, if it is material.

Mr. Andersen: It is material. I will call Mr. Mathew J. Spiesman, Jr., again.

The Court: Take the stand, Mr. Spiesman.

MATHEW J. SPIESMAN, JR.

was recalled as a witness on behalf of himself, the petitioner, and, having been previously sworn, was examined and testified further as follows:

Further Direct Examination

By Mr. Andersen:

Q. I hand you this letter and ask you to identify it. A. To identify the circumstances?

Q. No, to identify the letter is all.

A. A letter from the St. Maries bank, First Bank of St. Maries, in regards to Joe's savings account. [142]

The Court: Did I understand you to say that this was the savings account of Joe?

The Witness: The other children's money is in this account.

(Testimony of Mathew J. Spiesman, Jr.)

Mr. Andersen: Michael Joe Spiesman's account.

The Court: This letter, handed to the witness, for identification as I understand it, is a letter from the First Bank of St. Maries regarding the savings account of whom?

The Witness: Michael Joe.

The Court: All right.

Q. (By Mr. Andersen): Who is that letter to?

A. The letter is written to me personally.

Q. And who signed it?

A. G. E. Yenor, president of the bank.

Q. Mr. Spiesman, that is an account in the name of Michael Joe Spiesman with the First Bank of St. Maries? A. Yes.

Q. And it refers to deposits on January 7, '50, January 15, 1951, June 5, 1951, and September 6, 1951. Would you explain those deposits?

The Court: Are you offering this in evidence?

Mr. Andersen: Oh, yes. I forgot to offer it in evidence.

Mr. Basye: I object, your Honor, unless counsel [143] wants to explain to me the purpose of putting it in. He hasn't asked the witness whether he could identify the signature of the person who originated the letter, and I have no chance to identify the originator of the letter. It's mere hearsay, as far as I can see. There has been no showing as to the truth of the matter contained in the letter.

The Court: What have you to say, Mr. Andersen?

Mr. Andersen: My only purpose in offering it

(Testimony of Mathew J. Spiesman, Jr.)

was to show the method that Mr. Spiesman was handling certain dividends that were received from all the boys, having been deposited in one account, you see.

The Court: What is the date of the letter?

Q. (By Mr. Andersen): Who is the letter to?

A. The letter is to me and it is dated October 6, 1956.

The Court: Do you wish to restate your objection again?

Mr. Basye: I object on the ground it is hearsay, your Honor.

The Court: I will have to sustain the objection. We don't have the proper party here apparently to—as far as a letter which he received, yes, but the contents of it, I don't see what good it would do you. You are in a different boat than the one you were in when you had Mr. Flower here. He was the banker. He could testify to the records of his bank. [144]

Mr. Andersen: No further questions.

The Court: I think the record shows that Petitioner's Exhibit No. 22 was offered and the objection to it being received in evidence was sustained.

Mr. Andersen: Yes, sir.

(Petitioner's Exhibit No. 22 was marked for identification and rejected.)

The Court: Is there anything further? Do you wish to cross-examine?

Mr. Basye: No, sir. Respondent again rests.

Mr. Andersen: Petitioner rests.

The Court: Both parties now rest. The case will be taken under submission, with leave to file briefs. Do you wish to file simultaneous *seriatim* briefs?

Mr. Basye: *Seriatim* briefs, your Honor.

The Court: How much time do you want for your opening brief? The normal period is 45 days.

Mr. Andersen: I will take the 45.

The Court: Briefs will be filed *seriatim*, petitioner's opening brief in 45 days, respondent's brief 30 days thereafter and 15 days thereafter for reply. The clerk will read the dates.

The Clerk: Those dates will be November 23rd, the 30-day will be December 24th, and the following 15-day will be January 8th, 1957. [145]

The Court: Do you have the dates, gentlemen?

(No response.)

The Court: That is all for this case.

(Whereupon, at 4:50 p.m., Monday, October 8, 1956, the hearing in the above-entitled matter was closed.)

Filed: October 22, 1956, T.C.U.S. [146]

28 T. C. No. 62

Tax Court of the United States

Docket No. 56141

MATHEW J. SPIESMAN, JR., and MARY
SPIESMAN,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

FINDINGS OF FACT AND OPINION

Held: The five minor children of the petitioners were not bona fide partners in the Spiesman & Sons partnership during the years 1951, and 1952, within the meaning of sections 191 and 3797(a)(2) of the I.R.C. of 1939, as amended by section 340(a) and (b) of the Revenue Act of 1951.

MYRON E. ANDERSON, ESQ.,

For the Petitioners.

WENDELL M. BASYE, ESQ.,

For the Respondent.

Bruce, Judge: Respondent determined deficiencies in the income tax of the petitioners and additions to tax as follows:

| Year | Deficiency | Additions to Tax Sec. 294(d)(2) |
|------|------------------|------------------------------------|
| 1951 | \$ 2,155.22..... | \$356.93 |
| 1952 | 14,056.20..... | 986.14 |

Respondent, on brief, has abandoned his determination that petitioners are liable for additions to tax for the years involved under section 294(d)(2) of the Internal Revenue Code of 1939. Petitioners, at the hearing and on brief, have conceded or abandoned all other issues raised by the pleadings except one. The only question presented is whether the five minor children of petitioners were partners in the Spiesman & Sons partnership during the years 1951, and 1952, within the meaning of sections 191 and 3797(a)(2) of the Internal Revenue Code of 1939, as amended by section 340(a) and (b) of the Revenue Act of 1951.

FINDINGS OF FACT

Some of the facts were stipulated and are included herein by this reference.

Petitioners are husband and wife residing at St. Maries, Idaho. They filed a joint Federal income tax return for the calendar year 1951 with the then collector of internal revenue for the district of Idaho, and for the calendar year 1952, with the district director of internal revenue, Boise, Idaho.

Prior to 1950, petitioner Mathew J. Spiesman, Jr. (hereinafter sometimes referred to as Spiesman) was the owner of certain gambling devices commonly known as slot machines. These machines were operated in a bar known as the Gem State Club under an agreement between Spiesman and the Club, whereby Spiesman received 20 per cent of the receipts from the slot machines. Spiesman was presi-

dent and manager of the Gem State Club, a corporation. In 1947 the legislature for the State of Idaho enacted a statute (S.L. 1947, C. 151; sections 50-1501 to 1510, inclusive, Idaho Code), subsequently declared unconstitutional¹ and repealed,² providing that it should be lawful for any person to own and operate coin-operated amusement devices within the corporate limits of any incorporated city or village, after having first procured a license as therein provided. The term "person" was defined to include "an individual person, partnership, corporation or association."

On February 1, 1950, Spiesman, Jr., and his father, Mathew J. Spiesman, Sr., entered into a partnership agreement for the purpose of carrying on the business of operating and maintaining coin-operated amusement devices. The agreement recited that "the assets to be taken over by the partnership are in the possession and owned by the partner, M. J. Spiesman, Jr." It further recited that "M. J. Spiesman, Sr., agrees to pay a sum equal to one-half the value of the assets;" that they should bear "equally between them all licenses, fees, permits and other expenses" required for the support and man-

¹State v. Village of Garden City (Dec. 23, 1953), 74 Idaho 513, 265 P. 2d 328, holding S. L. 1947, C. 151, declaring coin-operated devices as gambling devices but not lotteries, violated Art. 3, §20 of the Idaho constitution, since such devices are lotteries. See also State ex rel. Nielson v. City of Gooding, 75 Idaho 36, 266 P. 2d 655.

²S. L. 1953, C. 62, §1, p. 82.

agement of the business; and that profits from the business should be divided, one-third to Spiesman, Sr., and two-thirds to Spiesman, Jr.

Spiesman, Sr., now 80 years of age, had for several years been distributing part of his estate by making gifts of real estate, stocks and mortgages to Spiesman, Jr., and to the latter's five sons, whose names and date of birth are as follows:

| Name | Date of Birth |
|------------------------|--------------------|
| Michael Joseph | October 21, 1940 |
| Philip James | November 29, 1943 |
| Leonard John | February 11, 1945 |
| Mathew James III | July 3, 1946 |
| Francis Edward | September 26, 1950 |

On December 1, 1951, a new partnership agreement was entered into between Spiesman, Sr., and Spiesman, Jr., individually and on behalf of his five minor sons, which (omitting the jurat) is as follows:

Partnership Agreement

This Agreement of Partnership, made in duplicate as of the first day of December, 1951, by and between Mathew James Spiesman, Sr., Mathew James Spiesman, Jr., Michael James [Joseph] Spiesman, Mathew James Spiesman, III, Philip James Spiesman, Leonard John Spiesman, and Francis Edward Spiesman, all of St. Maries, Benewah County, Idaho,

Witnesssseth, that the said parties have agreed and by these presents do agree to associate themselves as partners for the purpose of carrying on the business of operation and maintenance of coin-operated

amusement devices, and incidental concessions connected therewith, to the faithful performance of which they mutually bind and engage themselves, each to the other, their executors and administrators.

First: The name, style and title of such partnership shall be Spiesman & Sons,

Second: At the time of this agreement, the assets to be taken over by the partnership are in possession and owned by the partner[s], Mathew James Spiesman, Jr., [and Mathew J. Spiesman, Sr.] and are in the value of \$2,374.63. The capital of said partnership in addition to the aforementioned assets shall consist of cash contributions divided into nine equal shares, of which each of the partners shall own one-ninth, with the exception of the partner, Mathew James Spiesman, Jr., who shall own one-third of the shares. Further cash contributions shall consist of:

| | |
|----------------------------------|----------|
| Michael James Spiesman | \$100.00 |
| Mathew James Spiesman, III | 100.00 |
| Philip James Spiesman | 100.00 |
| Leonard John Spiesman | 100.00 |
| Francis Edward Spiesman | 100.00 |

The capital of the partnership in addition to the initial cash contributions enumerated above shall also consist of the income and profits arising from the employment thereof, with the exception of that which each is entitled to withdraw as hereinafter provided. That said capital may at any time be reduced or extended by agreement between the parties hereto, and that the said capital, together with all

credits, goods, wares or commodities bought or obtained by the said firm, by barter or otherwise, shall be kept, used and employed in and about the business aforesaid.

Third: The term for which this partnership is organized is for an indefinite period from and after December 1, 1951.

Fourth: Duties of Partners. The partner, Mathew James Spiesman, Jr., shall be actively in charge of the business and shall assume the functions customarily performed and shall perform the duties as manager. He shall devote a major portion of his time, attention, experience and endeavors to said business. The partners, Mathew James Spiesman, Sr., Michael James Spiesman, Mathew James Spiesman, III, Philip James Spiesman, Leonard John Spiesman and Francis Edward Spiesman, shall and will at all times during the continuance of the partnership bear, pay and discharge equally with all partners all the licenses, fees, permits and other expenses that may be required for the support and maintenance of said business.

Fifth: Books of Account. That there shall be kept at all times during the continuance of the partnership, a perfect, just and true set of books of accounts, wherein each of the said partners shall enter and set down, as well all money by them, or any of them, received, paid, laid out, and expended in and about the said business, as also all the goods, wares, commodities, and merchandise by them, or any of

them, bought or sold, by reason or on account of the said business, and all other matters and things whatsoever to the said businesss and management thereof in anywise belonging; which said books shall be used in common between the said partners, so that any of them may have access thereto without any interruption or hindrance of any of the others; that the said partners quarterly during the continuance of the said partnership, as aforesaid, to wit, on the first day of January, April, July, and October in each year, or oftener if necessary, shall make, yield, and render, each to the other, a true, just and perfect inventory and account of all the profits and increase by them, or any of them, made and of all loss by them, or any of them, sustained; and also of all payments, receipts, and disbursements, and of all other things by them made, received, disbursed, acted, or suffered, in their said business, and the same account being so made, they shall and will clear and adjust, each to the other, at the time, their just share of the profits so made as aforesaid.

Sixth: Monies of the partnership shall be deposited in the Farmers & Merchants Bank, Rockford, Washington. All expenses of the business shall be first paid, and no partner is to draw any salary except out of the profits of the business. Accurate books shall be kept at all times. All bills and liabilities shall be paid by check and the books of the partnership shall be open to inspection of each partner at any time.

Seventh: Share in Profits. Periodically, at either

monthly or quarterly intervals, each partner shall be entitled to withdraw from the business as a salary an amount of income commensurate with the capital stock owned by them and the services which they have contributed; however, under no circumstances shall said withdrawals impair the operating capital of the partnership. No further withdrawals shall be made in the form of profit after payment of salaries to the partners until such time as all indebtedness owing by the partnership has been paid.

In addition to the above-mentioned share in the profits, the partner, Mathew James Spiesman, Jr., shall draw as salary for managing the partnership business the sum of Two Hundred Fifty (\$250) Dollars per month.

Eighth: Dissolution of Partnership. In the event of dissolution of the partnership by reason of death, withdrawal or any other act of any partner or partners before the expiration of said term, the remaining partner or partners may, if desired, have the right to purchase the interest or interests of said partner or partners in the business assets and good will by paying a reasonable value of such interest or interests. Upon such payment, the retiring partner or partners, or his representatives, or the representatives of his estate, shall execute and deliver to the remaining member or members all necessary conveyances of said interest or interests. The continuing member or members shall assume all of the existing firm obligations and shall be entitled to continue using the firm name unrestricted as to the

length of time during which it may be used or its sale or assignment.

Tenth [sic]: Acts Not to Be Done Without Consent. (a) None of the partners hereto during the continuance of this partnership shall assume any liability for another or others by means of endorsement or by becoming guarantor or surety or in any other manner even though not specifically mentioned herein, without first obtaining the consent of the other parties hereto in writing. (b) No partner shall have the authority to do any act in contravention of these Articles. (c) No partner shall have the authority to do any act that would make it impossible to carry on the ordinary business of the partnership. (d) No partner shall confess a judgment. (e) No partner shall have the authority or power to possess partnership property or assign their rights in specific partnership property for other than a partnership purpose. (f) No partner shall have the authority to admit any other person or persons as a general partner. (g) No partner shall have the authority to admit any person or persons as a limited partner unless the right to do so is agreed upon by all other partners in writing.

In Witness Whereof, the parties hereto have hereunto set their hands and seals the day and year in this partnership agreement first above written.

/s/ MATHEW JAMES SPIESMAN,

/s/ MATHEW JAMES SPIESMAN, JR..

/s/ MICHAEL JOSEPH SPIESMAN,

/s/ MATHEW JAMES SPIESMAN, III,
/s/ PHILIP JAMES SPIESMAN,
/s/ LEONARD JOHN SPIESMAN,
/s/ FRANCIS EDW. SPIESMAN,

By /s/ M. J. SPIESMAN, JR.,
Guardian for Michael James Spiesman, Mathew
James Spiesman, III, Philip James Spiesman,
Leonard John Spiesman, Francis Edward
Spiesman.

[Brackets represent interlineations.]

The interlineations appearing in paragraph numbered "Second," were inserted by Spiesman, Jr., in 1953, after the initiation of the investigation of petitioners' income tax returns for the years involved. The \$100 cash contributions on behalf of each of the minor children were made by their father either from funds belonging to them or advanced by him.

A partnership return (Form 1065) was filed by Spiesman & Sons for the period beginning December 1, 1951, and ending January 1, 1952, showing net earnings in the amount of \$3,254.30, distributable as follows:

| | |
|-------------------------------|-----------|
| Mathew J. Spiesman, I | \$ 361.59 |
| Mathew J. Spiesman, II | 1,084.76 |
| Mathew J. Spiesman, III | 361.59 |
| Philip Spiesman | 361.59 |
| Michael Joe Spiesman | 361.59 |
| Francis Spiesman | 361.59 |
| Leonard Spiesman | 361.59 |

No withdrawals for this period were shown and the capital accounts of each of the above-named partners at the beginning of the period and at the end of the period were shown as follows:

| | Beginning of Period | End of Period |
|-------------------------------|------------------------|------------------|
| Mathew J. Spiesman, I | \$ 100.00 | \$ 461.59 |
| Mathew J. Spiesman, II | 2,774.63 | 3,859.39 |
| Mathew J. Spiesman, III | 100.00 | 461.59 |
| Philip Spiesman | 100.00 | 461.59 |
| Michael Joe Spiesman | 100.00 | 461.59 |
| Francis Spiesman | 100.00 | 461.59 |
| Leonard Spiesman | 100.00 | 461.59 |

A partnership return (Form 1065) was filed by Spiesman & Sons for the year 1952 showing net earnings in the amount of \$46,021.71, distributable as follows:

| | |
|-------------------------------|-------------|
| Mathew J. Spiesman, I | \$ 4,846.85 |
| Mathew J. Spiesman, II | 16,940.61* |
| Mathew J. Spiesman, III | 4,846.85 |
| Philip Spiesman | 4,846.85 |
| Michael Joe Spiesman | 4,846.85 |
| Francis Spiesman | 4,846.85 |
| Leonard Spiesman | 4,846.85 |

*On briefs (request for finding number 9), petitioners assert, and respondent agrees, that "included in the \$16,940.61, distributable share of Mathew J. Spiesman, Jr., is salary for services rendered of \$2,400 and distribution of earnings of \$14,540.61."

The capital accounts of each of the above-named partners at the beginning of the year, withdrawals, and the capital accounts at the end of the year were shown as follows:

| | Capital Account at Beginning of Year | Withdrawals | Capital Account at End of Year |
|-----------------------------|--|-------------|--------------------------------------|
| Mathew J. Spiesman, I | \$ 461.59 | \$ 3,688.83 | \$1,619.61 |
| Mathew J. Spiesman, II | 3,859.39 | 16,768.68 | 4,031.32 |
| Mathew J. Spiesman, III .. | 461.59 | 4,690.16 | 618.28 |
| Philip Spiesman | 461.59 | 2,592.80 | 2,715.64 |
| Michael Joe Spiesman | 461.59 | 2,593.25 | 2,715.19 |
| Francis Spiesman | 461.59 | 3,448.01 | 1,860.43 |
| Leonard Spiesman | 461.59 | 4,950.96 | 357.48 |

The income shown on the partnership returns was derived from the operation of the slot machines and other coin-operated amusement devices, most of which were located in the Gem State Club and continued to be operated under the original agreement as to percentages entered into between Spiesman and the Club prior to the formation of the partnerships between Spiesman and his father, and Spiesman & Sons. All licenses for the operation of the machines were obtained and paid for by the Gem State Club or other locations where they were placed. Spiesman spent about 3½ hours each day in the management of Spiesman & Sons' affairs. He was also manager of the Gem State Club, for which he received a salary of \$6,000 in 1951 and \$7,500 in 1952, and spent 6 to 7 hours each day in its management. Capital is a material income-producing factor of the Spiesman & Sons partnership. The salary paid Spiesman for managing the affairs of the partnership is reasonable.

Spiesman had been appointed guardian of the estates in his four minor sons, Michael Joseph, Philip James, Leonard John, and Mathew James, III, by the Probate Court of Benewah County,

Idaho, on April 17, 1947. He was appointed guardian of the estate of Francis Edward by the same court on October 13, 1953.

No opening or annual inventory and accounting reports of the estates of any of the minor children, as required by Sections 15-1825 and 15-1826 of the Idaho Code (1948), were filed by Spiesman as guardian during any of the years 1947 to 1952, inclusive; nor was there any supervision of the guardianship accounts otherwise exercised by the probate court during that period. On October 23, 1953, after the initiation of the investigation of petitioners' income tax returns for the years involved, Spiesman as guardian filed annual inventory and accounting reports of the estates of four of his sons, Mathew James, III, Philip James, Michael Joseph and Leonard John, for each of the years 1947 to 1952, inclusive. These reports were approved, allowed and settled by order of the Probate Court dated November 12, 1953. As he had not, prior to October 13, 1953, been appointed guardian of Francis Edward, no inventory or accounting report of the estate of Francis Edward was filed at that time. Annual inventory and accounting reports of the estates of all five of the children for the years 1953, 1954, and 1955 were filed in 1954, 1955, and 1956, respectively.

Withdrawals from the Spiesman & Sons partnership on behalf of each of the five minor children, during the year 1952, were made by Spiesman. According to the inventory and accounting reports filed by Spiesman as guardian of the estates of his

minor children, the following amounts were withdrawn from Spiesman & Sons on their behalf, respectively, during the years 1952 to 1955, inclusive:

| | 1952 | 1953 | 1954 | 1955 |
|------------------------------|------------|------------|-----------|------|
| Mathew James | \$5,690.16 | \$3,124.20 | \$ 270.73 | None |
| Philip James | 1,592.80 | 3,557.13 | 2,005.33 | None |
| Michael Joseph | 1,593.25 | 3,626.12 | 1,936.62 | None |
| Francis Edward ..(not shown) | | 3,079.35 | 291.94 | None |
| Leonard John | 3,848.01 | 3,500.16 | 269.85 | None |

Separate savings accounts for each of the minor children were opened in the Farmers & Merchants Bank of Rockford, Rockford, Washington, on March 17, 1952. Some of the funds withdrawn from the partnership on behalf of the children were deposited in their respective savings accounts; some were used to pay premiums on their individual life insurance policies; some were used to pay their income taxes; and occasionally some were used to purchase additional securities for them. None of these funds, insofar as the accounting reports filed with the Probate Court reveal, were used for the support or living expenses of any of the minor children.

On their income tax return for 1952, petitioners reported the sum of \$17,077.25 as partnership income, of which \$16,940.61 was received from Spiesman & Sons, and \$136.64 from Spiesman and Resor.

The five minor children of petitioners were not the owners of capital interests in the partnership and were not bona fide partners in the Spiesman & Sons partnership during the years 1951 and 1952.

Opinion

This is a family partnership case involving the question whether the five minor children of the petitioners were bona fide partners in the Spiesman & Sons partnership during the taxable years 1951 and 1952, within the meaning of Sections 191 and 3797 (a)(2) of the Internal Revenue Code of 1939, as amended by Sections 340(a) and (b) of the Revenue Act of 1951. Respondent has determined that they were not and accordingly included in petitioners' distributive share of the partnership income the amounts of \$1,807.95 for 1951 and \$24,234.25 for 1952, being the aggregate of the amounts shown on the partnership returns as distributable to the children. Petitioners contend that the children were bona fide partners having a 1/9th interest each, and that the above amounts were properly includable in the income of the children during said years.

Section 340(a) of the Revenue Act of 1951, amended Section 3797(a)(2) of the Internal Revenue Code of 1939, which defines the terms partnership and partners, by adding thereto the sentence, "A person shall be recognized as a partner for income tax purposes if he owns a capital interest in a partnership in which capital is a material income-producing factor, whether or not said interest was derived by purchase or gift from any other person." Section 340(b) of the Revenue Act of 1951 also amended the 1939 Code by adding thereto Section 191, which provides:

Sec. 191. Family Partnerships:

In the case of any partnership interest created by gift, the distributive share of the donee under the partnership agreement shall be includible in his gross income, except to the extent that such share is determined without allowance of reasonable compensation for services rendered to the partnership by the donor, and except to the extent that the portion of such share attributable to donated capital is proportionately greater than the share of the donor attributable to the donor's capital. The distributive share of a partner in the earnings of the partnership shall not be diminished because of absence due to military service. For the purpose of this section, an interest purchased by one member of a family from another shall be considered to be created by gift from the seller, and the fair market value of the purchased interest shall be considered to be donated capital. The "family" of any individual shall include only his spouse, ancestors, and lineal descendants, and any trust for the primary benefit of such persons.

These amendments, applicable to the years involved, were primarily for the purpose of clarification which the Congressional Committees deemed necessary to make clear the fundamental principle that, where there is a real transfer of ownership, a gift of a family partnership interest is to be respected for tax purposes without regard to the motives which activated the transfer, at the same time providing specific safeguards against the use of the

partnership device to accomplish the deflection of income from the real owner.

The reports of the House Committee on Ways and Means (H. Rept. No. 586, 82nd Cong., 1st Sess., C.B. 1951-2, pp. 357, 380-381) and of the Senate Committee on Finance (S. Rept. No. 781, 82nd Cong., 1st Sess.; C.B. 1951-2, pp. 458, 485-487) state that the amendment relating to family partnerships is intended:

* * * to harmonize the rules governing interests in the so-called family partnership with those generally applicable to other forms of property or business. Two principles governing attribution of income have long been accepted as basic: (1) income from property is attributable to the owner of the property; (2) income from personal services is attributable to the person rendering the services. There is no reason for applying different principles to partnership income. If an individual makes a bona fide gift of real estate, or of a share of corporate stock, the rent or dividend income is taxable to the donee. Your committee's amendment makes it clear that, however the owner of a partnership interest may have acquired such interest, the income is taxable to the owner, if he is the real owner. If the ownership is real, it does not matter what motivated the transfer to him or whether the business benefited from the entrance of the new partner.

The reports point out, however, that:

The amendment leaves the Commissioner and the courts free to inquire in any case whether the donee or purchaser actually owns the interest in the partnership which the transferor purports to have given or sold him. Cases will arise where the gift or sale is a mere sham. Other cases will arise where the transferor retains so many of the incidents of ownership that he will continue to be recognized as a substantial owner of the interest which he purports to have given away, as was held by the Supreme Court in an analogous trust situation involved in the case of *Helvering v. Clifford* (309 U.S. 351). The same standards apply in determining the bona fides of alleged family partnerships as in determining the bona fides of other transactions between family members. Transactions between persons in a close family group, whether or not involving partnership interests, afford much opportunity for deception and should be subject to close scrutiny. All the facts and circumstances at the time of the purported gift and during the periods preceding and following it may be taken into consideration in determining the bona fides or lack of bona fides of a purported gift or sale.

Not every restriction upon the complete and unfettered control by the donee of the property donated will be indicative of sham in the transaction. Contractual restrictions may be of the

character incident to the normal relationships among partners. Substantial powers may be retained by the transferor as a managing partner or in any other fiduciary capacity which, when considered in the light of all the circumstances, will not indicate any lack of true ownership in the transferee. In weighing the effect of a retention of any power upon the bona fides of a purported gift or sale, a power exercisable for the benefit of others must be distinguished from a power vested in the transferor for his own benefit.

* * *

Therefore the bill provides that in the case of any partnership interest created by gift the allocation of income according to the terms of the partnership agreement shall be controlling for income tax purposes except when the shares are allocated without proper allowance of reasonable compensation for services rendered to the partnership by the donor, and except to the extent that the allocation to the donated capital is proportionately greater than that attributable to the donor's capital. In such cases a reasonable allowance will be made for the services rendered by the partners, and the balance of the income will be allocated according to the amount of capital which the several partners have invested. * * *

Respondent argues that the five minor children of petitioners were not bona fide owners of capital in-

terests in the partnership during the years 1951 and 1952 for the reasons that there was no accounting to or supervision by the Probate Court of the guardianship estates during these years, and, under the licensing provisions of the Idaho statute the children could not be treated as the real owners of a capital interest in the slot machines. Respondent further argues that the participation of the minor children in the slot machine business was illegal in Idaho and, therefore, they should not be recognized as the real owners of a capital interest in the partnership business.

The proper accounting for a ward's estate by a fiduciary is primarily a matter for the state court to determine. In view of our conclusions herein-after discussed, we need not, and do not, here determine whether the filing by a fiduciary of such accountings and reports as are required by state law is a necessary condition of the recognition of a minor as a member of a partnership. Section 29.191-1 of Regulations 111, as carried forward into Section 39.191-1 of Regulations 118, referred to by respondent, was not promulgated until August 18, 1953. See T.D. 6037, C.B. 1953-2, p. 213. We have no doubt, however, that the filing or failure to file such accountings and reports may be considered, as a fact and circumstance following the purported gift, in determining the bona fides or lack of bona fides of a purported gift or sale, and we have done so in our determination.

With respect to the legality of the transaction,

Section 50-1503 of the Idaho Code (S.L. 1947, C. 151), later declared unconstitutional and repealed,³ provided that it should be lawful for any person to own and operate coin-operated amusement devices within the limits of any incorporated city or village only, and after having first procured a license as thereafter provided. Section 50-1504 provided that no coin-operated amusement device might be operated on any premises except those owned or leased by the licensee, and, further, that no person other than the licensee "may have any legal, equitable or financial, title or interest in such device, whether by ownership, mortgage, conditional sales contract, or otherwise, nor receive any rent or remuneration therefrom or from the operation thereof." It is also to be noted that Section 50-1509 made it unlawful to "possess or permit operation" of such devices without license having first been procured as therein provided.

The machines here in question were operated on the premises of the Gem State Club, or other locations, not shown to have been owned or leased by petitioners, the partnership or any of the parties to the Spiesman & Sons partnership agreement. All licenses were obtained and paid for by the Gem State Club or other locations. It is clear, therefore, that, even if the Idaho statute under which they purported to act had not been declared unconstitutional and repealed, the minor children of petitioners cannot be considered as having any "legal,

³See Footnotes 1 and 2.

equitable or financial, title or interest" in such devices and that they could not legally "receive any rent or remuneration" from the operation of such devices.

Both Spiesman and his father testified that the reason for the purported gifts to the children was for the purpose of making them partners in the business of the Spiesman & Sons partnership. In *E. C. Ellery*, 4 T.C. 407, we held that since the gifts in that case were expressly or impliedly conditioned on the formation of a partnership which could not be formed because of the illegality of its business under the state law, the gifts failed at the outset. The same rule applies here.

Aside from the foregoing, however, we think it clear that there were no bona fide gifts of interests in the machines, which were the income-producing assets of the partnership, to the children, and the formation of the Spiesman & Sons partnership was a sham. The partnership agreement (Petitioner's Exhibit 10) recited that, "At the time of this agreement, the assets to be taken over by the partnership are in possession and owned by the partner, Mathew James Spiesman, Jr., and are in the value of \$2,374.63." The original typewritten agreement, after the initiation of the investigation of petitioners' income tax returns involved herein, was interlined to indicate that Spiesman and his father each owned a half interest in such assets at the time of this agreement. Whether such assets were owned by one or both is immaterial, so far as the children are

concerned. Petitioners claim that each of the children received a 1/9th interest in such assets upon the execution of the partnership agreement and therefore was entitled to receive 1/9th of the distributable income. The facts shown do not support this contention.

The partnership agreement itself is, to say the least, inconclusive with respect to the transfer of title to the machines. It does not appear that there were any other written transfers of title and the books and records of the partnership were not placed in evidence. It appears, however, from the partnership return (Form 1065) filed by Spiesman & Sons for the period beginning December 1, 1951, and ending January 1, 1952, as well as the return for the year 1952, that the full value of the machines was shown as included in the capital account of the petitioner, and no interest in such machines was included in the capital account of any of the children.

Moreover, the partnership returns show that withdrawals on behalf of the children were not equal for the year 1952, as they should have been if the children each owned a 1/9th interest in the capital assets. The unequal treatment of the children with respect to withdrawals from the partnership is likewise shown by the accounting reports filed by Spiesman as guardian for 1952, 1953, and 1954. In some instances the amount withdrawn was in excess of the purported distributable share of the child, and in other instances it was less. Spiesman explained such discrepancies as follows:

* * * the difference in the amount of money withdrawn was due to the fact that Joe, the oldest boy, and Phil, the next oldest boy, had income from dividend stocks prior to the, and more stock, than the other children, and I tried to even up—at that time I tried to even up the cash account of each child, so that if I had an accident, why, or I got killed or died, my youngest child wouldn't say, "Well, my dad wasn't very fond of me; he didn't leave me anything," and I didn't want to have that happen and I wanted them to be even as far as cash was concerned, and then they would eventually receive stock or whatever my dad was going to leave them when he died. But the cash account I tried to even up.

However commendable such treatment of his children by a father may be, the fact remains that it did not conform to the purported partnership interests of the children, or to his duties as a guardian if such partnership interests were bona fide; it was the action of a parent who owned, controlled and distributed his own funds according to his own desires and ideas.

The question to be determined herein is one of fact to be determined from all the facts and circumstances. As stated in the reports of the Senate and House Committees, *supra*, "All the facts and circumstances at the time of the purported gift and during the periods preceding and following it may be taken into consideration in determining the bona

fides or lack of bona fides of a purported gift or sale." See also *Commissioner v. Culbertson*, 337 U.S. 733, wherein the Supreme Court said that the question whether a partnership exists for income tax purposes is:

* * * whether, considering all the facts—the agreement, the conduct of the parties in execution of its provisions, their statements, the testimony of disinterested persons, the relationship of the parties, their respective abilities and capital contributions, the actual control of income and the purposes for which it is used, and any other facts throwing light on their true intent—the parties in good faith and acting with a business purpose intended to join together in the present conduct of the enterprise. * * *

Considering all the facts and circumstances herein we hold that the five minor children of the petitioners were not the real owners of capital interests in the partnership and were not bona fide partners in the Spiesman & Sons partnership during the taxable years 1951 and 1952.

Inasmuch as respondent has abandoned his determination that the petitioners are liable for additions to tax for the years involved under Section 294(d) (2) of the Internal Revenue Code of 1939,

Decision will be entered finding petitioners liable for deficiencies in income tax in the

amount of \$2,155.22 for the year 1951, and in the amount of \$14,056.20 for the year 1952.

Reviewed by the Court.

Filed May 31, 1957, U.S.T.C.

Served June 4, 1957.

Entered June 4, 1957.

The Tax Court of the United States, Washington

Docket No. 56141

MATHEW J. SPIESMAN, JR., and MARY
SPIESMAN,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Findings of Fact and Opinion, filed May 31, 1957, it is

Ordered and Decided: That there are deficiencies in income tax for the years 1951 and 1952 in the amounts of \$2,155.22 and \$14,056.20, respectively.

/s/ J. GREGORY BRUCE,
Judge.

Served June 7, 1957.

Entered June 7, 1957.

[Title of Tax Court and Cause.]

ORDER AMENDING DECISION

For cause appearing of record, it is

Ordered that the decision entered in the above-entitled cause on June 5, 1957, be, and it is hereby amended by changing the final period to a comma and adding thereto the phrase: "and that there are no additions to tax under Section 294(d)(2) of the Internal Revenue Code of 1939 for the years 1951 and 1952," and that as thus amended the second paragraph of said decision shall read as follows:

"Ordered and decided: That there are deficiencies in income tax for the years 1951 and 1952 in the amounts of \$2,155.22 and \$14,056.20, respectively, and that there are no additions to tax under Section 294(d)(2) of the Internal Revenue Code of 1939 for the years 1951 and 1952."

It is further Ordered that the decision entered June 5, 1957, remain the same in all other respects.

Dated: August 27, 1957.

[Seal] /s/ J. GREGORY BRUCE,
 Judge.

Served August 29, 1957.

Entered August 29, 1957.

In the United States Court of Appeals
for the Ninth Circuit

Tax Court Docket No. 56141

MATHEW J. SPIESMAN, JR., and MARY
SPIESMAN,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR REVIEW

Mathew J. Spiesman, Jr., and Mary Spiesman, Petitioners in this cause, hereby file their Petition for Review, by the United States Court of Appeals for the Ninth Circuit, of the decision by the Tax Court of the United States entered on June 5, 1957, reported at 28 TC No. 62, determining deficiencies in the Petitioners' federal income taxes for the calendar years 1951 and 1952 in the respective amounts of \$2,155.22 and \$14,056.20. This Petition for Review is filed pursuant to the provisions of Sections 7482 and 7483 of the Internal Revenue Code. The Petitioners respectfully show as follows:

I.

Allegations of Venue

The Petitioners are husband and wife with principal address being St. Maries, Idaho. For the calendar year 1951, Petitioners filed a joint income tax

return with the then Collector of Internal Revenue for the District of Idaho, and for the calendar year 1952 Petitioners filed a joint income tax return with the District Director of Internal Revenue, Boise, Idaho.

II.

Nature of the Controversy

Prior to 1950, Petitioner, Mathew J. Spiesman, Jr. (when Petitioner is referred to in the singular, it will refer to Petitioner Mathew J. Spiesman, Jr.), was the owner of certain coin-operated amusement devices (hereinafter sometimes referred to as the machines). Petitioner was also the president of the Gem State Club, an Idaho corporation. Petitioner Mathew J. Spiesman, Jr., entered into an agreement with the Gem State Club whereby the machines referred to above were operated on the premises of the said corporation with the Petitioner, Mathew J. Spiesman, Jr., receiving 20 per cent of the total receipts from the machines.

The machines owned by Mathew J. Spiesman, Jr., Petitioner herein, were transferred to a partnership in February of 1950, known as Spiesman & Spiesman, said partnership being between Mathew J. Spiesman, Jr., and his father, Mathew J. Spiesman, Sr. Mathew J. Spiesman, Sr., paid into the partnership one-half the value of the machines contributed by the other partner, Mathew J. Spiesman, Jr., and received one-third the profits of the said partnership. The other two-thirds of the partnership profit were distributed to Mathew J. Spiesman, Jr.

On the 1st day of December, 1951, a new partnership was formed between Mathew J. Spiesman, Jr., Mathew J. Spiesman, Sr., and the five minor children of Mathew J. Spiesman, Jr., and Mary Spiesman, the Petitioners herein. The names and the birthdays of the five children who composed the additional partners in the partnership known as Spiesman & Sons are as follows:

| Name | Date of Birth |
|------------------------|--------------------|
| Michael Joseph | October 21, 1940 |
| Philip James | November 29, 1943 |
| Leonard John | February 11, 1945 |
| Mathew James, III..... | July 3, 1946 |
| Francis Edward | September 26, 1950 |

Mathew J. Spiesman, Jr., was the legally appointed guardian for the five children mentioned above. In the formation of the Spiesman & Sons partnership referred to above, the above-named five children of the Petitioners herein each contributed \$100 to the partnership. The \$100 contribution to capital made by the children was by and through Mathew J. Spiesman, Jr., the legally appointed guardian of the children. The money came either from the children's individual funds or was advanced to them by Mathew J. Spiesman, Jr., for this purpose.

During the taxable years 1951 and 1952, the partnership Spiesman & Sons showed a profit. Tax returns were filed for those taxable years showing the profit and showing the said profit as a distribution

to the individual partners referred to above. The funds from the partnership profit which went to the minor children of Petitioners herein were deposited in separate savings accounts which were opened in the Farmers and Merchants Bank of Rockford in Rockford, Washington, for this specific purpose. Some of the funds were used to pay premiums on the life insurance policy of the children; some of the funds were used to pay income taxes and some of the funds were used to purchase securities for the said children. None of the funds were used for the support or maintenance or living expense of the said minor children of Petitioners herein.

The Petitioners for the taxable years 1951 and 1952 in filing their joint income tax return, reported thereon only their distributable share of the partnership income from the partnership Spiesman & Sons during these taxable years. The Commissioner of Internal Revenue, however, asserted that the partnership was invalid for tax purposes claiming that it was not a bona fide family partnership for the purpose of reporting income.

The Commissioner therefore took the entire partnership income, including the income distributed by the partnership to Mathew J. Spiesman, Sr., and taxed the entire amount to Petitioners herein. The Tax Court of the United States in the opinion referred to above held that although capital was an income-producing factor of the Spiesman & Sons partnership, the five minor children of Petitioners were not owners of a capital interest in the partner-

ship and were not bona fide partners in Spiesman & Sons during the taxable years 1951 and 1952.

III.

The said Petitioners being aggravated by the findings of facts and conclusions of law contained in the said findings and opinion of the Court as referred to above and by its decision entered pursuant thereto, desires to obtain a review thereof by the United States Court of Appeals for the Ninth Circuit. The five minor children of Petitioners were bona fide partners of Spiesman & Sons during each of the calendar years 1951 and 1952.

/s/ PAUL CASTOLDI,

/s/ FRANCIS J. BUTLER,

Counsel for Petitioners.

Duly verified.

Affidavit of Service by Mail attached.

Received and filed August 30, 1957, T.C.U.S.

[Title of Court of Appeals and Cause.]

NOTICE OF FILING PETITION FOR REVIEW

Nelson P. Rose,
Chief Counsel,
Internal Revenue Service,
Washington, D. C.

Dear Sir:

You are hereby notified that the Petitioners on the 30th day of August, 1957, filed with the Clerk

of the Tax Court of the United States, Washington, D. C., a Petition for Review by the United States Court of Appeals for the Ninth Circuit of the decision of the Tax Court of the United States heretofore rendered in the above-entitled cause. A copy of the Petition for Review and the assignment of error as filed is attached hereto and served upon you.

Dated at Spokane, Washington, this 28th day of August, 1957.

Respectfully,

/s/ PAUL CASTOLDI,

/s/ FRANCIS J. BUTLER.

Service of copy acknowledged.

Received and filed September 5, 1957, T.C.U.S.

[Title of Tax Court and Cause.]

CERTIFICATE

I, Howard P. Locke, Clerk of the Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 28, inclusive, constitute and are all of the original papers on file in my office as called for by the "Designation of Contents of Record," including joint Exhibits 1-A through 7-G, attached to stipulation of facts; petitioners' Exhibits 8 through 14, 16 through 21, admitted in evidence (petitioners' Exhibits 15 and 22, marked for

identification and not left with the record), respondent's Exhibits H through N, admitted in evidence, in the case before the Tax Court of the United States docketed at the above number and in which the petitioners in the Tax Court case have filed a petition for review as above numbered and entitled, together with a true copy of the docket entries in said Tax Court case, as the same appear in the official docket in my office.

In testimony whereof, I hereunto set my hand and affix the seal of the Tax Court of the United States, at Washington, in the District of Columbia, this 24th day of September, 1957.

[Seal] /s/ **HOWARD P. LOCKE,**
Clerk, Tax Court of the
United States.

[Endorsed]: No. 15752. United States Court of Appeals for the Ninth Circuit. Mathew J. Spiesman, Jr., and Mary Spiesman, Petitioners, vs. Commissioner of Internal Revenue, Respondents. Transcript of the Record. Petition to Review a Decision of The Tax Court of the United States.

Filed October 8, 1957.

Docketed October 16, 1957.

/s/ **PAUL P. O'BRIEN,**
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

Tax Court Docket No. 56141

MATHEW J. SPIESMAN, JR., and MARY
SPIESMAN,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

STATEMENT OF POINTS TO BE RELIED
UPON BY PETITIONERS

The above-named petitioner-appellants intend to rely upon the following points on their appeal from the decision of the Tax Court of the United States to the United States Court of Appeals for the Ninth Circuit:

1. The findings of fact made by the Tax Court of the United States in the above-entitled cause are erroneous in the following particulars:

(a) The Tax Court of the United States erred in finding that the five children of Petitioners were not the owners of capital interests in Spiesman & Sons partnership and were not bona fide members of Spiesman & Sons partnership during the taxable years 1951 and 1952.

(b) The Tax Court of the United States erred in failing to find that Mathew J. Spiesman, Sr., was

a bona fide member of Spiesman & Sons, a partnership, during the years 1951 and 1952.

2. The Tax Court of the United States erred in finding that the Petitioners were liable for deficiencies in income tax for either of the years 1951 and 1952.

/s/ PAUL CASTOLDI,

/s/ FRANCIS J. BUTLER.

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 23, 1957, U.S.C.A.